STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED PROFESSORS OF MARIN, LOCAL 1610, CFT/AFT, AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-1524
v.	)	PERB Decision No. 1092
MARIN COMMUNITY COLLEGE DISTRICT,	)	March 21, 1995
Respondent.	)	

Appearances: Robert J. Bezemek, Attorney, for United Professors of Marin, Local 1610, CFT/AFT, AFL-CIO; Liebert, Cassidy & Frierson by Larry J. Frierson and Jeffrey Sloan, Attorneys, for Marin Community College District.

Before Blair, Chair; Carlyle and Garcia, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Marin Community College District (District)[1] to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ found that the District unilaterally implemented a policy of placing former managers on the certificated salary schedule, a negotiable topic under the Educational Employment Relations Act (EERA)[2] and later refused the United Professors of Marin, Local 1610, CFT/AFT, AFL-CIO's (UPM) request to negotiate the issue. This

[1]A request for oral argument by the District was denied by the Board on March 11, 1994.

[2]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

conduct was found to violate EERA section 3543.5(b) and (c).[3] The ALJ also concluded that as no individual rights were violated, a violation of section 3543.5(a) could not be sustained.

The Board, after review of the entire record, finds the ALJ's findings of fact to be free from prejudicial error and adopts them as it's own. We are also in agreement with, and hereby adopt, the conclusions of law set forth in the ALJ's decision. In the following discussion, we will address the exceptions by the District and UPM which we believe warrant comment.[4]

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[3]Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[4]Several non-party petitions to file informational briefs were submitted in this case. In the petitions submitted, *no* newly discovered law or other matter that would affect the outcome of this decision was raised. Therefore, pursuant to PERB Regulation 32210, the petitions are denied and the briefs are not being considered in reaching the Board's decision.

DISTRICT'S EXCEPTIONS

The District alleges three fundamental flaws in the ALJ's decision. The first concerns the ALJ's error in not deferring the underlying matter to arbitration and in failing to dismiss the charge for Untimeliness. Secondly, it argues that the ALJ's finding that the District was obligated to negotiate with UPM over the credit managers received while working as administrators, is at odds with the EERA. Finally, the District contends UPM was on notice for years about the District's practices relating to conferring credit to managers for their management experience for purposes of salary schedule placement.

UPM'S EXCEPTIONS

The focus of UPM's exceptions is the ALJ's remedy which allows former managers to keep, and continue receiving salary based upon the illegally-found conduct of the District. Although UPM urges the Board to issue a rescission of the illegal placements, it supports the temporary authorization of the payment of the current salary to the affected former managers pending completion of future negotiations.

DISCUSSION

Deferral Argument

. As part of its case both before the ALJ and the Board, the District alleges that UPM's allegations must be deferred to binding arbitration. In Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), the Board held that it has no jurisdiction over matters involving conduct arguably

prohibited by a provision of the collective bargaining agreement until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted either by settlement or by binding arbitration.

The key portion of the Board's Lake Elsinore holding, as pertaining to this case, is that the conduct at issue must be arguably prohibited by the language of the agreement. UPM argues that the District adopted a new policy exempting managers (who were transferring to the bargaining unit) from the contractual "Step 7" limit of the salary schedule for teachers new to the District. To the extent that the alleged change allowed managers to receive higher than the step 7 limit when returning to the bargaining unit, the District argues that the alleged new policy was covered by the contract and is subject to binding arbitration.

The ALJ heard extensive testimony on whether the step 7 limit applied to District managers transferring into the faculty. Beginning in 1981 and continuing through a series of negotiations for new agreements between the parties, no evidence was introduced supporting the District's position that the parties had contemplated the application of the step 7 limit to District managers. Testimony was even offered that in prior years the parties had conducted negotiations that resulted in step limits for specifically identified groups of employees for salary

placement purposes, however, none of these step limits could be interpreted to be applied to managers.[5]

Additionally, the ALJ found that the contract language regarding "permanent teachers new to the district" had never been interpreted by the parties. Applying contractual principles, the ALJ determined that for a person to fall within the meaning of the contract, the person must be a permanent teacher and new to the District. Although the former managers have joined the certificated salary schedule and thus, are permanent, it can not be said that they are new to the District as they had previously worked for the District in the management ranks.

Accordingly, the Board agrees with the finding of the ALJ that the conduct complained of by UPM was not arguably prohibited by the language of the agreement and thus the ALJ properly denied the District's request to defer UPM's allegations to binding arbitration.

Negotiability

Next, EERA section 3543.5(c) requires an employer to meet and negotiate in good faith with the exclusive representative. A unilateral change in terms and conditions of employment within the scope of representation is a per se refusal to negotiate. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; Pajaro Valley

[5]Additionally, as the ALJ correctly points out, a 1981 memo by a District representative outlined the rationale for the placement of an administrator at a level higher than Step 7 as "there is no precedent in the District either in policy or past practice for placement of a management team member on the salary schedule."

Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.)

To establish a unilateral change, the charging party must show that: (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Glendora Unified School District (1991) PERB Decision No. 876.)

The question that arises here is whether or not the placement of managers on the salary schedule at a level higher than step 7 is a subject that is within the scope of representation as established by EERA section 3543.2. In Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim), the Board established a three-prong test to determine whether matters not specifically enumerated are in fact negotiable under EERA section 3543.2. In the Anaheim decision, the Board stated:

> . . . a subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the

> appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission. [Fn. omitted.]

The California Supreme Court approved this test in San Mateo City School Dist, v. Public Employment Relations Bd. (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].

As to the first prong of the test, the question is whether or not the placement of managers on the salary schedule is related to wages. The Board concurs with the ALJ that placement of former managers on the negotiated salary schedule relates to wages and satisfies the first prong of the Anaheim test. (Remington Arms Co. (1990) 298 NLRB 266 [134 LRRM 1024].)

As to the second prong of Anaheim, the ALJ was correct in determining that the parties have had a long stable relationship and that the topic is one of concern to both management and employees. Further, the ALJ properly found no evidence that the mediatory influence of collective negotiations is not the appropriate method to resolve this conflict.

However, the most complex part of this case is whether or not the third prong of the Anaheim test is met. As the ALJ properly stated:

> The question remains whether negotiating about the salary to be paid former managers here would significantly abridge the District's managerial prerogatives essential to achievement of its mission.

The ALJ determined that the answer to this question was no.

The Board agrees with the ALJ and UPM that negotiating about salary step placement of former managers does not run afoul of the Anaheim test. The ALJ was correct in determining that negotiating about the placement of former managers would not impact the District's ability to run its schools. Also, the Board supports the ALJ's conclusion in that if this action was deemed to be a management prerogative, it could lead to undermining and destablizing the bargaining relationship as the District could continue to hire administrators at a much higher salary than other teachers who may have much more experience. Therefore, the Board concludes that the ALJ properly determined that this is a negotiable subject within the scope of representation.

Notice

The last major area of contention for the District is that UPM had been put on notice of the District's conduct establishing the practice of assigning managers to the salary schedule. The principal focus of the District's timeliness argument is that UPM received actual notice of the District's practices through Kathryn Freschi (Freschi), a former manager who had been reassigned to the faculty and from 1990-1992 was a member of UPM's Executive Council.

However, the ALJ determined that Freschi's testimony was sufficiently inconsistent so as to cast doubt on Freschi's ability to recall events with accuracy. Moreover, the ALJ

concluded that it appeared that Freschi did not have an understanding of the criteria used for her own step placement in 1987 nor step placements for former managers. The ALJ therefore concluded that even if the information was imputed to UPM, it was insufficient to put UPM on notice that the District had implemented a policy for placing former managers on the certificated salary schedule.

In Los Angeles Unified School District (1988) PERB Decision No. 659, the Board commenting on credibility determinations stated:

> [W]e must emphasize that credibility determinations play a vital role in the consideration of this allegation. While we are free to consider the entire record and draw our own conclusions from the evidence presented, we will afford deference to an ALJ's findings of fact which incorporate credibility determinations. Santa Clara Unified School District (1979) PERB Decision No. 104.

The Board finds this to be the proper instance where deference is appropriate. The ALJ, after hearing live testimony in this case and, in such a role, determining the credibility of the witnesses based upon first hand observation, is in a much better position to accurately make such determinations of Freschi's testimony than is the Board, which is only in the position to review the written transcripts of the hearing. (Santa Clara Unified School District (1979) PERB Decision No. 104, pp. 12-13; Beverly Hills Unified School District (1990) PERB Decision No. 789, pp. 8-9.)

Remedy

As outlined earlier, UPM argues that the administrators who have been placed at a higher step level should be returned to the proper step level pending the outcome of negotiations between the District and UPM. The Board rejects this exception. The Board has the authority to fashion such remedies to unfair practices as its determines will effectuate the purposes of the laws it enforces under EERA section 3541.3(i). The Board must look to see if the remedy effectuates the purposes of the EERA (e.g., Nevada Joint High School District (1985) PERB Decision No. 557; Cajon Valley Union School District (1989) PERB Decision No. 766). In this case, the ALJ correctly pointed out that rescission of the step placements would result in substantial loss of income by the named employees. The Board finds the rescission of step placement of the former managers and requiring them to repay any money received would not effectuate the purposes of the EERA. Further, in taking their new positions it must be assumed that the managers would not have accepted a position in which they would be required to accept a substantial salary reduction.

ORDER

Based upon the findings of fact, conclusions of law and the entire record in this case, the Board finds that the Marin Community College District (District) violated section 3543.5(b) and (c) of the Educational Employment Relations Act (EERA) by unilaterally implementing a policy of placing former managers on the certificated salary schedule and later refusing the United

Professors of Marin, Local 1610, CFT/AFT, AFL-CIO's (UPM) request to negotiate the issue. It is hereby ordered that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Taking unilateral action and failing and refusing to negotiate in good faith with UPM, exclusive representative of the District's certificated employees, about the step placement of former managers on the negotiated certificated salary schedule.

2. By the same conduct, denying to UPM, rights guaranteed by the EERA, including the right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Upon request, meet and negotiate with UPM about any future decision to place former managers on the negotiated certificated salary schedule.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Chair Blair joined in this Decision.

Member Garcia's dissent begins on page 13.

GARCIA, Member, dissenting: The Educational Employment Relations Act (EERA), Public Employment Relations Board (PERB or Board) precedent, and California policy expressed through Supreme Court decisions clearly mandate that a case go to arbitration when the collective bargaining agreement (CBA or agreement) between the parties contains a broad arbitration clause which permits the arbitrator to apply and interpret the provisions of the grievance agreement. Only specific clauses can exclude a dispute from a broad arbitration clause.

In 1978, the California legislature adopted the EERA statute, which mandates deferral of arbitrable cases and directs parties to the arbitration statutes under the Code of Civil Procedure.[1]

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[1]EERA section 3541.5(a)(2), provides, in part, that:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . .
>
> (2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

EERA section 3548.5 provides that:

> A public school employer and an exclusive representative who enter into a written agreement covering matters within the scope of representation may include in the agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application, or violation of the agreement.

EERA section 3548.6 provides that:

Although none of California's public sector labor relations statutes are copies of the National Labor Relations Act (NLRA), our statutes select and combine principles established by the National Labor Relations Board (NLRB), with provisions designed to accommodate public employment in California.[2] PERB and California courts turn for instruction to precedent established under NLRB decisions.[3] A brief overview of the federal precedent on pre-arbitration deferral is helpful.

Under the NLRA, the NLRB was granted broad quasi-legislative and quasi-judicial powers. Employing that authority, the NLRB

> If the written agreement does not include procedures authorized by Section 3548.5, both parties to the agreement may agree to submit any disputes involving the interpretation, application, or violation of the agreement to final and binding arbitration pursuant to the rules of the board.

EERA section 3548.7 provides that:

> Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefor in the agreement or pursuant to an agreement made pursuant to Section 3548.6, the aggrieved party may bring proceedings pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefor in such agreement or pursuant to Section 3548.6.

[2]See Zerger, Cal. Public Sector Labor Relations (1989) Chapter 2, section 2.01, page 3, footnote 4, citing Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 173, 176-177, [172 Cal.Rptr. 487].

[3]Id. section 2.02, page 4, footnote 1, citing cases involving use of NLRA precedent.

voluntarily adopted a policy that favored arbitration of disputes. The United States Supreme Court reviewed that voluntary policy in a series of cases that have become known as the Steelworkers Trilogy.[4] In one of those cases, Warrior, the Court adopted a strong policy favoring arbitration of labor disputes whenever arbitrability was in question by stating:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. [Warrior, supra, at 582 and 583.]

Under federal law, including NLRB decisions, regardless of whether it is clear or uncertain that an agreement provides for arbitration of the disputed subject, the case is given to the arbitrator for further decision regarding matters of contract interpretation.[5] The arbitrator then decides whether the agreement covers the subject matter and who has standing to participate in arbitration. In other words, except in rare or unusual cases, the courts and quasi-judicial agencies such as the NLRB and PERB should first determine whether the contract provides for arbitration, and if so, they turn the matter over to the arbitrator to interpret the scope of the arbitration, unless

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[4]Steelworkers v. American Mfg. Co. (1960) 363 U.S. 564 [46 LRRM 2414]; Steelworkers v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574 [46 LRRM 2416] (Warrior); and Steelworkers v. Enterprise Wheel & Car Corp. (1960) 363 U.S. 593 [46 LRRM 2423].

[5]See Roy Robinson Chevrolet (1977) 228 NLRB 828 [94 LRRM 1474].

there is clear evidence that this was not the result the parties intended.

The California Supreme Court shortly thereafter adopted the same policy in enforcement cases brought under California arbitration statutes. For example, in Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169 [14 Cal.Rptr. 297], a case brought under Code of Civil Procedure section 1282 to compel arbitration of a labor dispute, the California Supreme Court stated that California state policy is not substantially different from federal policy to promote labor peace through arbitration. The court held that, where the grievance procedure is not limited to specific complaints, then all disputes which arise are covered if a broad arbitration clause is in the agreement. Furthermore, it was noted that proceeding to arbitrate is evidence that the dispute is arbitrable. The court stated:

> This being so, the federal rule to the effect that in such cases all disputes as to the meaning, interpretation and application of any clause of the collective bargaining agreement, even those that prima facie appear to be without merit, [fn. omitted] are the subject of arbitration, is adopted by this court. [Id, at 184.]

In another California Supreme Court case, O'Malley v. Wilshire Oil Co. (1963) 59 Cal.2d 482 [30 Cal.Rptr. 452] (O'Malley). the court confirmed California's adoption of the federal rules:

> Although the issue in Posner did not involve interstate commerce and therefore did not necessarily invoke the federal rule as described by the United States Supreme Court, we nevertheless as a matter of policy

> followed the federal approach. We held that the trial court, instead of confining itself to the issue of whether the dispute was subject to arbitration, improperly passed upon the merits of the issue. [Id. at 487.]

The court went on to state, citing the U.S. Supreme Court case of Warrior that:

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. [O'Malley. supra. at 491, citing Warrior.]

Those cases make it clear that federal policy and the law of California are consistent and California has gone further by adopting statutes that mandate deferral to an arbitrator in labor relations cases where the parties to the dispute agreed on arbitration. The majority opinion escapes the statutory mandate to defer this case to arbitration by misconstruing the PERB-created phrase "arguably prohibited" to mean that conduct must be forbidden by the contract before it is subject to deferral. To the contrary, a review of the creation of the phrase "arguably prohibited" shows that it means deferral occurs whenever the dispute might be covered by the contract. This conclusion is confirmed by a close examination of PERB precedent on resolving questions of arbitrability; they reveal that PERB confirmed and adopted the test of arbitrability identified in the California and federal cases reviewed above.

For example, in Inglewood Unified School District (1990) PERB Decision No. 821 (Inglewood), PERB expressly adopted the

federal "not susceptible" language, making PERB policy synonymous with the standard in Warrior and adopted by the California Supreme Court. After referring to the language employed in Warrior, PERB stated:

> We cannot conclude that Article XX section 20.1 is not susceptible to an interpretation that would allow an arbitrator to resolve this dispute. We find that the District's contracting out during the 3-week layoff period is arguably prohibited by the language in Article XX section 20.1 of the parties[']collective bargaining agreement. (Inglewood at p. 7.)

It is obvious that PERB condensed the standard into the paraphrase "arguably prohibited." This is confirmed in Riverside Community College District (1992) PERB Order No. Ad-229 (Riverside), where PERB stated that:

> Further, the Board has previously noted California's strong policy in favor of arbitration. [Citation.] In [Inglewood], the Board found that arbitration should not be denied 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (Citations.)' The Board therefore affirms the ALJ's finding that the CBA's grievance machinery covers the matter at issue. [Riverside at p. 4.]

The majority opinion misconstrues the paraphrase "arguably prohibited" by subjectively employing it to escape California law which mandates deferral to arbitration.[6] Contrary to the

[6]This case illustrates the "subjectivity" problem I warned against in my dissent in State Center Community College District (1994) PERB Order No. Ad-255.

majority view, Lake Elsinore School District (1987) PERB Decision No. 646 did not employ the paraphrase to reach its result.

District's Duty to Negotiate

The majority here ignores the development of the step assignment policy in the District which misleads the reader to conclude that the District unilaterally changed a practice and the United Professors of Marin, Local 1610, CFT/AFT, AFL-CIO (UPM) had no notice of the policy and therefore no obligation to demand negotiations. The following chronology is extracted from the record to establish that UPM was put on notice of the "past practice" and discussed step assignment policy on several occasions.

In 1974 UPM, as part of a certificated employees council (CEC), met with the District to discuss wages. At that time the District provided a guide which stated:

> (1) Placement: A new member of the faculty shall not be recommended for placement higher than Step 7 on the Certificated Salary Schedule, regardless of experiences (including teaching experience, military experience, and/or work experience)..

The CEC accepted the step 7 limit.

In 1978 UPM became the exclusive representative of the faculty. The District publicly adopted changes to salary schedule placement which continued the limit on placement and clarified several issues. First, the Board would retain authority to determine the credit to be awarded for placement on the salary schedule. Second, the director of personnel would be authorized to credit past service of an applicant for employment

in the District in teaching and military service. Third, the personnel director was authorized to award, at his/her discretion, either full or partial credit (year for year, up to six years) for full time work experience directly related to the college subject to be taught or the professional area of assignment. Fourth, these regulations were to be uniformly applied to all applicants.

For the years 1977 through 1981, the District personnel office used the 1973 minutes of the Faculty and Administrative Personnel Committee to extend credit for noncredit teaching experience when initially placing faculty on the salary schedule.

In 1979 during negotiations for the first CBA, UPM proposed changes to placement of new faculty members on a salary schedule. No agreement on this subject emerged. Instead, a step 7 limit for "teachers new to the system" was put in the CBA. No other changes to the step 7 limit were proposed in contract negotiations that occurred from 1979 through 1986.

In 1981 an administrator exercised retreat rights[7] and joined the faculty for the first time. The personnel director unilaterally determined placement on the schedule by giving the administrator credit for seven years of related experience prior to service in the District. The personnel director believed he had the authority to make interpretations of "related service" and to conclude that the step 7 limit only applied to applicants

[7]Under the Education Code administrators have a right to retreat into faculty.

for initial employment in the District. The administrator was placed on step 7 for service outside the District and then immediately advanced to step 13 by credit for six years of administrative service to the District. At a public board meeting the action was affirmed. The facts were put into a memo (the Padover memo) and thereafter used by the personnel office as guidance. UPM had no notice of existence of the memo. Personnel office policy was to grant full credit for any administrative experience in the District when managers retreated and credit for outside service so that the combined credits often placed entrants to faculty above step 7.

In 1983, in reliance on the Padover memo, the personnel office put two administrators who retreated into faculty positions above step 7 since they were not new to the District. Both actions were board approved at a public meeting.

In 1985 a group of non-credit instructors who were not managers went into the faculty under the same interpretation of the Padover memo as applied to the retreating administrators. Three were placed above step 7 based on outside and in District service credits. Since they were not "new to the system" they were not held to step 7.

In 1987 new language was inserted into the CBA to clarify that the step 7 limit applied to "permanent teachers new to the District." A step 3 limit was imposed on temporary instructors new to the "District" and they could advance on the schedule through re-hiring.

The proposed decision identifies seven more cases of faculty placement consistent with interpretation of the Padover memo during the 1987-1991 period. In addition, the cases show personnel director discretion was applied when decision makers judged what kind or quality of service is eligible for credit. In general, it had become easier to achieve qualified credit for "related" outside service and in-district service. The mix of cases involve people who started in management, non-management and rotating transfers into and out of faculty and management positions. Some of the transfers were publicly approved by the board and there is no showing of a secret policy. There is a showing that creditable service sometimes came about because of requests from the person going into a faculty position.

During contract negotiations for 1990-93, placement of English as a second language (ESL) instructors on the schedule was discussed. It was agreed that ESL instructors would get credit for prior non-credit teaching service, be limited to step 7 for initial placement and step 10 for advancement.

In 1990, the personnel director began work on a series of drafts to memorialize department practices covering placement or movement on the salary schedule. It included department interpretations made in individual cases. The proposed guidelines were never completed or used for decision making. The draft guidelines were forwarded to UPM at their request in October 1991. UPM asserted the draft guidelines were a modification of existing practices and requested negotiations.

The District responded that the zipper clause precluded negotiations and there was no change in past practice.[8] Discussions without negotiations continued and UPM proposed a change that would make step 7 the top step administrators could achieve on retreating to faculty. The focus of talks became whether or not to limit managers who retreat to faculty to step 7 on the salary schedule. Discussions did not resolve the issue and a complaint was issued. After the complaint issued more managers retreated to faculty and were placed above step 7.

It is readily apparent that District policy on step assignments was established by 1987 and evidence of agreed-to changes shows that UPM had notice of the District practice or method of making assignment decisions. While there is evidence that the policy was dynamic, that does not amount to a unilateral change in a past practice or contractual commitment.[9]

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[8]The zipper clause reads:

> This document comprises the entire Agreement between the District and UPM/AFT, 1610, on the matters within the lawful scope of negotiations. Subject to the decision of PERB, UPM and the District shall have no further obligation to meet and negotiate, during the term of this Agreement, except as otherwise provided for herein, on any subject whether or not said subject is covered by this Agreement, even though such subject was not known nor considered at the time of the negotiations leading to the execution of this Agreement. (CBA pg. 43.) (In addition, the CBA contains a grievance and arbitration procedure.)

[9]See, e.g., Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro), where PERB recognized the "dynamic status quo" concept in federal labor law. That concept

CONCLUSION

There is strong evidence that an arbitrator, experienced in labor relations disputes, could come to a different conclusion than the ALJ based on the contract, contractual defenses, and precedents appropriate when considering the unilateral change issue. The District has been denied its contractual right to submit this case to arbitration by the Board's decision which is contrary to California law.

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recognizes that change can be a normal part of the pattern of conduct between an employer and a union. As PERB noted in Pajaro;

> While [federal precedent] prohibits disturbance of the status quo during negotiations, the NLRB has held that the "status quo" against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment. The NLRB has held that changes consistent with such a pattern are not violations of the "status quo." [Id. at p. 6; citations omitted.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
, PUBLIC EMPLOYMENT RELATIONS BOARD
An agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-1524, United Professors of Marin. Local 1610, CFT/AFT, AFL-CIO v. Marin Community College District, in which all parties had the right to participate, it has been found that the Marin Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(b) and (c).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Taking unilateral action and failing and refusing to negotiate in good faith with the United Professors of Marin, Local 1610, CFT/AFT, AFL-CIO (UPM), exclusive representative of the District's certificated employees, about the step placement of former managers on the negotiated certificated salary schedule.

2.. By the same conduct, denying to UPM, rights guaranteed by the EERA, including the right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Upon request, meet and negotiate with UPM about any future decision to place former managers on the negotiated certificated salary schedule.

Dated: _____ MARIN COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED PROFESSORS OF MARIN, LOCAL 1610, CFT/AFT, AFL-CIO, Charging Party, v. MARIN COMMUNITY COLLEGE DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-1524 PROPOSED DECISION (7/19/93)

Appearances: Robert J. Bezemek, Attorney, for the United Professors of Marin, Local 1610, CFT/AFT, AFL-CIO; Littler, Mendelson, Fastiff & Tichy, by Nancy L. Ober, Attorney, for Marin Community College District.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

This unfair practice charge was filed by the United Professors of Marin, Local 1610, CFT/AFT, AFL-CIO (UPM or Charging Party), against the Marin Community College District (District or Respondent) on December 24, 1991, and amended on May 5, 1992.

The general counsel of the Public Employment Relations Board (PERB or Board) issued an initial complaint on February 28, 1992, alleging the District bypassed the Charging Party and unilaterally implemented policies covering placement of former managers on the negotiated salary schedule. The District answered the complaint on March 24, 1992.

A settlement conference was conducted by a PERB administrative law judge (ALJ) on March 26, 1992, but the dispute was not resolved.

On April 30, 1992, prior to the start of the formal hearing, the Charging Party moved to amend the complaint. The motion contained multiple additional allegations that the District bypassed UPM and unilaterally implemented a variety of policies covering placement of former managers on the negotiated salary schedule. UPM alleges that the District, by this conduct violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA or Act).[1]

The District's amended answer, filed on May 29, 1992, denied all allegations and set forth several affirmative defenses. Denials and affirmative defenses will be addressed below, as necessary.

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3543.5(a), (b) and (c) make it unlawful for a public school employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

In a series of motions, the District sought dismissal of the complaint based on deferral and statute of limitation claims, as well as the assertion that the alleged unlawful changes do not constitute a generalized effect on the bargaining unit. The District also opposed UPM's motion to amend the complaint. On June 12, 1992, the undersigned ALJ granted UPM's motion to amend the complaint and denied the District's motion to dismiss.

On July 17, 1992, at the close of the sixth day of hearing, the undersigned ALJ granted the Charging Party's motion to conform to proof in order to add the allegation that the District unilaterally instituted a practice of paying managers for performing bargaining unit work. (See Riverside Unified School District (1985) PERB Decision No. 553.) Thus, the complaint, as amended, alleges that the District (l) bypassed the exclusive representative and dealt directly with former managers in placing them on the certificated salary schedule; (2) unilaterally implemented (for salary schedule placement) and later refused to negotiate about a policy which, among other things, (a) grants one year credit for less than thirty units of instruction, (b) grants credit for classified service, (c) grants credit for instruction in non-credit areas, (d) grants credit for management service, (e) grants "double step credit" for management and other service, (f) grants credit for management service unrelated to the teaching assignment, and (g) places former managers above the contractual Step 7 limit on the certificated salary schedule when entering the faculty; and (3) unilaterally implemented a policy

under which managers were paid for performing bargaining unit work (teaching).

Eighteen days of formal hearing were conducted between June 16 and November 4, 1992, in Marin, California. With receipt of the final brief on March 30, 1993, the case was submitted.[2]

FINDINGS OF FACT

Jurisdiction

The District is a public school employer within the meaning of section 3540.i(k). UPM is an employee organization within the meaning of 3540.i(d), and the exclusive representative of a unit of the District's certificated employees within the meaning of section 3540.i(e).

I. Past Practices

A. District Policies

Prior to becoming exclusive representative of the District's certificated employees, UPM was part of a "certificated employees council" (CEC), which met with the District to discuss wages, hours and working conditions. Paul Christensen (Christensen) was the UPM representative to the CEC. The District was represented by, among others, Berkeley Johnson (Johnson) and Don Green (Green).

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[2]Pursuant to PERB Regulation 32210, three former managers (Ronald Gaiz, Kent Lowney and Kathyrn Freschi) filed informational briefs. The Charging Party's motion to strike those parts of the informational briefs filed by Freschi and Gaiz, based on the ground that they referred to evidence not included in the formal record, is granted. Those portions of the informational briefs which refer to evidence not included in the administrative record are hereby rejected, and will not be considered in preparation of this proposed decision.

In October 1974, then District Superintendent John Gresham (Gresham) provided Christensen with a copy of the District handbook for faculty, and the District's "General Staff Guide" regarding personnel policies and practices. Section 4100 was part of the "General Staff Guide." Section 4100(i) governs "Placement on Salary Schedule." It provides:

> "(1) Placement: A new member of the faculty shall not be recommended for placement higher than Step 7 on the Certificated Salary Schedule, regardless of the candidate's combination of experiences (including teaching experience, military experience, and/or work experience)."

The express language of this policy, read in its entirety, appears to cover selection of applicants from outside the District for initial placement on the faculty salary schedule. The policy does not indicate that it was intended to cover administrators who entered the faculty ranks.

Responding to Christensen's inquiry about the basis of the Step 7 limit, Johnson explained that the limit was necessary for the fiscal security and stability of the District. According to Christensen, Johnson explained that the Step 7 limit restricted "placement on the salary schedule to no higher than Step 7, when you were initially placed in the District." The CEC accepted the Step 7 limit.

Another District policy, section 309, specifically addresses initial placement on the salary schedule, superseding in part the earlier policy found in section 4100. Section 309 was adopted by the District in November 1978 in a public meeting. Like section

4100(i) before it, section 309 describes experience that can be credited for initial placement on the salary schedule, and limits step placement to Step 7:

INITIAL PLACEMENT ON SALARY SCHEDULE

The Board retains the authority to specify the salary of new positions and to determine the credit to be awarded for placement on an existing salary schedule.

The Director of Personnel is authorized to credit for placement on the salary schedule past service of an applicant for employment in this District on the following basis:

1. Placement - A new member of the faculty shall not be recommended for placement higher than Step 7 on the Certificated Salary Schedule, regardless of the candidate's combination of experiences (including teaching experience, military experience, and/or work experience).

2. Teaching Experience - Full credit (year for year, up to six years) shall be given for full-time teaching experience (subject to limitations in paragraph [1], above). Credit shall also be given for part-time college teaching experience based on the formula that 30 part-time teaching units shall count as a full year's teaching experience. Experience as a teaching assistant shall be applicable only if the candidate has had full responsibility for teaching the class to which he was assigned. (Part-time teaching experience is also subject to the limitation in paragraph [1].)

3. Military Experience - Full credit (year for year, up to six years) shall be given for full-time military experience (subject to limitations in paragraph [1], above), if and only if, military experience has been acquired while the candidate was on leave from teaching in an education institution.

4. Work Experience - The Personnel Director shall, at his/her discretion award either full or partial credit (year for year, up to six years) for full-time work experience (including military except that work

> experience obtained in the military service shall not also count as military experience, under paragraph 3 above) directly related to the college subject to be taught or the professional area of assignment, (subject to limitations in paragraph 1 above). Work experience used in satisfaction of step credit (on the Certificated Salary Schedule) shall not be applied, also, in satisfaction of column credit (on the Certificated Salary Schedule).
>
> These regulations shall be uniformly applied to all applicants.

The express language of section 309, like its predecessor, appears to cover selection of applicants from outside the District for placement on the certificated salary scale. It does not expressly cover administrators when entering the faculty.

Another District policy, section 309.5, entitled "Movement on Salary Schedule," was also adopted by the District in November 1978 at a public meeting and covered, among other things, vertical movement on the salary schedule for full-time and part-time faculty. Section 309.5 provides as follows regarding vertical movement on the salary schedule:

> B. VERTICAL MOVEMENT
>
> Full-Time and Part-Time Faculty
>
> Vertical movement for full-time faculty members is effected once each year on July 1, at the rate of one step for every thirty teaching units. Faculty members who are on a Board-approved reduced teaching loan of 18 units per academic year; Board-approved participation in a phased-in early retirement program of at least one-half of the number of days of service required for a regular full-time assignment; a medical leave of absence; and a sabbatical leave are also eligible to move vertically on the salary schedule on July 1.
>
> Mid-year certificated appointees are required to complete three semesters before being eligible for

> salary advancement, it being observed that it is a common practice for District to require a certificated employee to work at least 75% of the days in a given school year before he/she is eligible for step advancement on the salary schedule.
>
> Vertical advancement for part-time faculty members to the seventh step on the schedule shall be at the rate of one step for every thirty teaching units in the District, either during regular or summer sessions, its equivalent elsewhere when satisfactorily documented, or a combination of District and out-of-District experience. No more than thirty teaching units in a given year may be applied toward a step increase, which may be effected at the beginning of any semester or summer session only. Past the seventh step, vertical advancement for part-time faculty members shall be possible only by experience in the District. Part-time counselors, librarians, or other non-administrative certificated personnel shall, in a similar fashion, advance by the accumulation of full-time equivalent experience.

Another District policy, reflected in a document entitled "Minutes of Faculty and Administrative Personnel Committee of February 16, 1973" (Minutes), was passed on by Berkeley Johnson to personnel specialist Jan Moffett (Moffett). The Minutes provide in pertinent part:

> There was discussion concerning allowing salary schedule advancement for educational experiences other than formal classroom. It was MSC unanimously to equate 45 hours of non-classroom activity as equivalent to 1 unit of credit.

Christensen testified that he was aware that the "45 to 1" rule was adopted prior to collective bargaining. According to David Pia (Pia), the District's personnel director from 1977 to 1981, the District has used the Minutes to extend credit for noncredit teaching experience when initially placing faculty on the salary schedule.

B. Collective Bargaining Agreements

UPM became the exclusive representative for the District's faculty in 1978. In 1979, during negotiations for the first contract, UPM proposed that the parties establish a Degree and Certificate Committee

> . . . for the purpose of allocating salary differentials to all faculty, counselors and librarians. Membership on this Committee shall be one (1) representative of the District and two (2) faculty members chosen by the Union.

UPM further proposed that

> 31.11. All new faculty members shall be placed on Step 1 of the salary schedule (with column placement according to education) until evidence of experience is submitted and evaluated. Within two months of hiring, new faculty members shall be placed on the step appropriate to their evaluated experience and shall be paid retroactively to the date of their assignment for loss in salary caused by the experience evaluation process. All evaluation of experience shall be done by the Degree and Certificate Committee.

Ultimately, there was no agreement to establish a committee to determine step placements of new faculty beyond Step 1 or to review experience and qualifications for salary placement.

Instead, a certificated salary schedule with a Step 7 limit for "teachers new to the system" was put into the first contract without discussion. In addition, the parties agreed that the contract would "modify or replace any policies, rules, regulations, procedures or practices of the District which shall be contrary to or inconsistent with its terms."

Following negotiations, Christensen met with District board members Wallace Hall (Hall) and Al Curtis (Curtis), at the request of then Superintendent Gresham, to assist in identifying policies superseded by the collective bargaining agreement. During the meeting, certain superseded policies were identified by Hall, but Christensen could not recall if Hall identified a policy covering the Step 7 limit. Neither Hall nor Curtis suggested any changes in how Step 7 limits applied to initial placements. Later, Christensen testified, he "heard rumors" that the District's effort to delete from policy those sections which conflicted with the contract had been aborted.

Christensen also served as co-chief negotiator for the 1981-84 contract. During these negotiations, the parties proposed no changes in the Step 7 limit.

Reopener negotiations led to a 1983-84 contract. Once again, the parties made no proposals to change the meaning of the Step 7 limit.

UPM chief negotiator for the 1987-90 contract was Ira Lansing (Lansing). The District's chief negotiator was Paul Loughlin (Loughlin) , assisted by Kent Lowney (Lowney) and Nancy Stetson (Stetson). During negotiations for the 1987-90 agreement, the subject of Appendix A (the salary schedule) and step placement arose. In an effort to avoid a formula that would have raised the salaries of temporary faculty members far higher than the District could accept, Loughlin proposed capping initial placement of part-time, temporary faculty at Step 3, and maximum

salaries at Step 7. UPM was concerned that the initial cap would be misused by the District, since part-time temporary faculty are in one sense "new hires" each time they are hired. District negotiators agreed that the Step 3 limit applied only to initial placement, not to subsequent employment.

In clarifying contract language after the negotiations, the term "teachers" in Appendix A was changed to "permanent teachers" and the term "system" was changed to "district." The modification to "permanent teachers" was needed because, with the addition of the Step 3 limit for temporary teachers, the Step 7 language had to be changed to distinguish permanent teachers. Also, with little discussion, Lowney and Lansing agreed to change "system" to "District."[3] The relevant contract language would now limit "permanent teachers new to the district" to Step 7.

Christensen served as UPM chief negotiator during the spring and summer bargaining which led to the 1990-93 contract. During negotiations, placement of English as a Second Language (ESL) instructors on the certificated salary schedule became an issue. ESL instructors in the non-credit program were paid on an hourly basis. They were not paid on the certificated salary schedule. UPM wanted ESL instructors paid on the schedule. Loughlin, serving as the District's negotiator, initially rejected the proposal as too expensive. However, the District eventually agreed to a formula under which non-credit ESL faculty received

[3]The preamble to the contract defines the "District" as the Marin Community College District.

credit for prior non-credit service. In addition, for ESL instructors, a Step 7 cap was put on initial placement, and a Step 10 cap on advancement. Christensen testified that this was the first time the District agreed to extend credit for non-credit service.

C. The Padover Case

In 1981, Steven Padover (Padover), dean of student services, left the administration and entered the faculty for the first time. Then Personnel Director David Pia determined that Padover's case was one of first impression, and there were no District policies or procedures covering this type of personnel action. Accordingly, Pia unilaterally determined how Padover should be placed.

Pia concluded that Padover had at least seven years of related experience prior to employment in the District, and therefore was entitled to placement at Step 7, based on his outside experience. Pia testified that credit had never previously been given for experience outside the District to place employees above Step 7 on the salary schedule. Pia believed that under section 309, the Step 7 limit did not apply to all of Padover's creditable experience, however, because he was not an applicant for initial employment. Rather, he was a District manager exercising retreat rights based upon his service as an administrator. Also, in Pia's view, he had the discretion to determine whether Padover's prior work experience was sufficiently related to his teaching assignment in the District

to be credited for placement purposes. Accordingly, he credited Padover's experience in management. Padover had been a manager and had responsibility for the subject area to which he was assigned.

In addition, faculty members who in the past moved to management and back to the faculty received credit for time spent as managers when they returned to the faculty salary schedule, and Pia felt Padover in fairness should receive the same credit. Thus, Pia counted Padover's six years as a District manager towards placement on the salary schedule.

In sum, Pia recommended that Padover receive credit up to Step 7 for his experience outside the District, and credit for all the time he worked in the District. On April 8, 1981, at a public meeting, the District approved Padover's reassignment to counselor in the bargaining unit, at Step 13 on the certificated salary schedule.

Padover never actually entered the faculty unit, and was never paid on the certificated salary schedule. He took a leave of absence and eventually left the District.

Pia left the District before the board voted on Padover's placement. Prior to his departure, however, he wrote a memorandum to Moffett describing how he determined Padover's placement. The memorandum stated:

> I have reviewed the applicable provisions of District policy with reference to placement of Dr. Steven L. Padover on the certificated salary schedule as a result of his resignation as Dean of Student Services, and his subsequent request to be a counselor

> within the District. Dr. Padover was initially employed by the Marin Community College District as the Dean of Student Services. He has never been placed on the certificated salary schedule. Since this employee has been a member of the management team from his date of hire, and since there is no precedent in the District either in policy or past practice for placement of a management team member on the salary schedule for employment under these circumstances, it is my decision to credit Dr. Padover with past experience outside the district up to Step 7. Dr. Padover will also be credited with six additional years for the time spent as an administrator within the District. It is therefore my decision to place Dr. Padover at Step 13, Class IV, with doctorate, with a salary of $30,734 per year.

UPM was never informed of the Padover memo or its contents. Kent Lowney recalled at hearing that he first saw the memo about five or eight years ago, but never gave it to UPM or discussed it with the union. Nor did Lowney, who succeeded Pia, discuss the memo with Pia.

Meanwhile, Moffett has maintained the Padover memo in her files since receiving it in 1981. Over the years, she has applied it in placing other managers on the certificated salary schedule. Moffett understood from the memorandum and discussion of it with Pia, that management experience in the District is to be credited regardless of the area of management in which the administrator served and regardless of the teaching assignment to which the administrator is assigned.

According to Moffett, administrators were never placed on the certificated salary schedule when they came into the District. If later placed on the certificated salary schedule

for the first time, they were credited with pre-District service related to their initial (administrative) assignment in the District up to Step 7, thereafter they advanced based on their management service in the District. These decisions were made in large part pursuant to the Padover memo given to her by Pia. What follows is a brief history of the placement of former managers and others on the negotiated salary schedule.

D. Placement of managers and others above Step 7

In 1983, Marijane Paulsen (Paulsen) and Roque Madrigal (Madrigal), became the first administrators after Padover to be placed for the first time on the certificated salary schedule. The placements were made by Lowney, after consultation with Moffett, and based on the Padover memo. Both Paulsen and Madrigal were placed above Step 7. The Step 7 contractual limit did not limit all of their creditable service, the District contends, because they were not new to the District or the system.

Specifically, Paulsen was hired as a dean in 1981, and became a biology instructor effective August 12, 1983. She was given credit up to Step 7 based upon her pre-District experience and advanced on the salary schedule for the two years she served as an administrator. Her placement, at Step 9, was approved by the District board in a public meeting.

Madrigal began employment as veterans coordinator (a classified position) in 1979, moved to veterans affairs officer in 1980 (also a classified position) and became dean, educational

and student services, a certificated position, effective January 1, 1981. He remained in management as a dean until the board, in a public meeting on July 26, 1983, appointed him to a half counseling and half coordinator of counseling assignment, at Step 10.

Pursuant to the Padover memo, Madrigal received credit for four years pre-District administrative experience, one year of military experience, and placed at Step 6. He was then advanced to Step 10, based on his four years service in the District. According to Lowney, Madrigal was not held to Step 7 because he was not newly employed in the District.

In 1985, the District placed a group of EOPS/HSPS noncredit instructors on the certificated salary schedule for the first time under the same interpretation of the Step 7 limit as had been used in the case of the former managers initially placed on the schedule. These EOPS/HSPS placements followed a 1984 advisory from the State Chancellor's office that noncredit EOPS/HSPS instructors were entitled to be tenured. That same year, the District gave these instructors tenure in the noncredit program.

The District later placed the EOPS/HSPS instructors on the certificated salary schedule. Pursuant to a side agreement between the parties, unit members transferred from temporary to permanent over the last three years, the EOPS/HSPS group, were to be paid "at their appropriate step and column placement."

At Lowney's direction, three were placed above Step 7 on the certificated salary schedule based upon their combination of outside experience and service in the District's noncredit program. They were not held to Step 7 because they were not permanent teachers "new to the system." While their pre-District experience was capped at Step 7, their District experience advanced them past Step 7. All of the EOPS/HSPS instructors initially placed on the salary schedule as permanent instructors in 1985 received credit for their noncredit experience in the District according to the (Minutes) formula for equating noncredit and credit service.

On June 9, 1987, the District reassigned Eugenie Yaryan (Yaryan) from a certificated management position (Coordinator of Student Activities) to the faculty, at Step 11 on the certificated salary schedule. Yaryan was first placed on the certificated salary schedule in the 1970s and had advanced based upon teaching credit courses in the District. In 1980, when she was at Step 4 on the schedule, Yaryn was named Student Activities Director, a certificated position when she took it. Later, it was changed to a classified position and, *on* October 9, 1985, reclassified as management. In 1987, the District reclassified the position back to a certificated management position. Neither the functions nor the title of the position changed.

When Yaryan returned to the faculty in 1987, Lowney directed Moffett to count all of Yaryan's service as Student Activities

Director, classified and certificated, toward her advancement on the certificated salary schedule.[4]

Meanwhile, on June 2, 1987, after Yaryan decided to return to the faculty, she wrote to Lowney requesting that her service as Student Activities Director be counted for placement as a faculty member, based upon the continuity of the position and her overall responsibility. Although Moffett did not advise Yaryan as to the content of the letter, she told Yaryan how to draft the letter and to whom it should be sent. Aside from her written inquiry to Lowney and the subsequent response from Moffett that her service as Student Activities Director would be counted for placement purposes, Yaryan said she had no discussions with any District representative regarding her salary placement. However, Lowney testified that he had a "long series of discussions" with Yaryan about step placement, and that she had been "crying out for recognition in any form for a long time." Accordingly, Lowney granted Yaryan's June 2, 1987, request.

On May 12, 1987, the District reassigned Kathryn Freschi (Freschi) to the faculty and placed her on the certificated salary schedule, effective August 12, 1987, at Step 10. Minutes of the UPM Executive Council meeting of May 5, 1987, reflect that UPM was aware of Freschi's assignment to the bargaining unit as an Italian teacher.

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[4]In contrast, Tara Flandreau (Flandreau), former UPM president, was denied credit for classified service when she was placed on the certificated salary scale. And Alexandra Hall (Hall) was denied credit for classified service when she was first placed on the certificated schedule.

In placing Freschi at Step 10, Moffett credited her with pre-District experience, District managerial service, and District noncredit teaching experience. In 1986, at the time of Freschi's initial reassignment to the faculty, she discussed her placement with Moffett to determine where she would be placed. It was after this discussion that Moffett made the calculations described immediately above.

Freschi's reassignment to the faculty was widely publicized. It was discussed at two District board meetings in the spring of 1987, she filed a tort claim and eventually a lawsuit against the District, and an editorial in the Marin Independent Journal of May 15, 1987, referred to Freschi's reassignment and drop in salary from $53,700 to $41,000 upon her reassignment.

Immediately following her reassignment to the faculty, Freschi requested and received a leave of absence. The board action item approving Freschi's request shows her salary schedule placement at Step 11. UPM received a copy of this document. In connection with her leave, Freschi was asked to refund two monthly salary payments, for July and August, 1987, which had already been made by the District toward her teaching salary for the 1987-1988 academic year. Freschi questioned the District's request in a letter to Lowney. She sent copies to then UPM Grievance Officer Ira Lansing, and enlisted the assistance of then UPM President Tara Flandreau, who discussed the District's salary refund request with Freschi.

Meanwhile, in 1988, Freschi sued the District over her reassignment, and was represented by UPM attorney Robert Bezemek (Bezemek). In 1989, in response to a request for production of documents by Freschi, the District provided Bezemek with Freschi's personnel file, including the board document placing her on the salary schedule at Step 11. In the course of her litigation Freschi also became aware of Yaryan's and Sandra Douglass's (Douglass) placement on the salary schedule. (The Douglass placement is more fully discussed below.) She obtained the board personnel item concerning Douglass's placement on the salary schedule in 1989 or 1990 and provided it to Bezemek.

From 1990 to 1992, Freschi was a member of the UPM Executive Council. Current and past UPM Constitutions provide that, "The officers of this organization shall consist of the nine (9) members of the Executive Council. . . ." Current and past UPM By-Laws provide that, "All officers of the Local are agents thereof. . . ." However, in this capacity she had no independent authority to speak for or bind UPM in representational matters such as grievances or unfair practices. Nor did she have express authority to accept notice from the District concerning changes in negotiable subjects. Her authority as a council member extended only to collecting information as the UPM budget monitor.

Sandra Douglass was employed in the District's noncredit program from 1976 to 1985. She was employed as a District manager from 1985 to January 20, 1989. Douglass taught one

credit class in 1979 and was placed on the certificated salary-schedule at Step 3. She received placement credit for her noncredit instructional service in the District pursuant to the formula for counting noncredit service discussed above.

The District reassigned Douglass to the faculty effective January 20, 1989, and placed her on the salary schedule at Step 12. The minutes of the UPM Executive Council, dated January 20, 1989, reflect the council's knowledge of Douglass's move from management to the faculty.

In calculating Douglass's placement on the salary schedule Moffett advanced Douglass on the schedule one step for each year of full-time service between 1979 and 1988, for her noncredit and management service.

On July 27, 1988, Douglass wrote to Miller requesting that she be assigned to a teaching assignment, effective in the spring of 1989. The letter did not mention step placement. Miller approved the request.

Ron Gaiz (Gaiz) started working for the District in 1980 as a part-time noncredit instructor assigned to teach ESL courses. He became a full-time administrator in 1987, and a permanent employee after completing his probationary period as an administrator in 1989.

Gaiz was first placed on the salary schedule at Step 14 when he taught a credit class in English in the fall of 1989 while a full-time administrator. At a board meeting on March 12, 1991,

Gaiz was reassigned from Director of Educational Programs to the faculty, effective July 1, 1991, at Step 16.

Gaiz's placement on the faculty salary schedule was based on credit for pre-District experience up to Step 7 (although Gaiz actually had over nine years of such experience), seven years credit for part-time noncredit service within the District, and four years credit for administrative service commencing in June 1987.[5] Moffett counted Gaiz's management experience based upon the Padover memo, regardless of the subject area of Gaiz's teaching assignment. She viewed this decision as a continuation of past practice. Moffett similarly viewed the decision to count Gaiz's noncredit instructional service in the District as a continuation of District practice which credited noncredit service under the formula passed on to her in the Minutes.

Before his reassignment to the faculty, Gaiz twice asked Moffett where he would be placed on the salary schedule if he left management and returned to teaching. He supplied Moffett with his work history and his educational background. She told him that his outside experience would place him at Step 7, and thereafter he would advance on the basis of his service in the District. Gaiz did not condition his return to the faculty on any particular placement on the schedule.

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[5]In contrast, Tara Flandreau was denied credit for non-credit teaching service when she was first placed on the certificated salary schedule. And James Parthum (Parthum) was denied credit for noncredit teaching at the time of his initial placement, although Jan Moffett told him the reason for the denial was because he did not have the appropriate credential at the time he acquired the experience.

Nancy Stetson was originally hired by the District in 1982 as Director of Public Affairs and Development, a classified management position. Stetson's title was changed, effective March 12, 1986, to Dean of Development and Information Services, and she moved into certificated management. Effective June 30, 1988, she became Acting Vice President for Student and Special Services, then Vice President of Planning and Development on November 10, 1988. As both a classified and a certificated manager Stetson was responsible for promoting the institution, planning, and resource development.

Stetson was first placed at Step 15 on the certificated salary schedule in the fall of 1990, when she taught a business class while holding her administrative assignment. At a District board meeting on May 21, 1991, Stetson was reassigned from Vice President of Planning and Development, a certificated management position, to a faculty position, teaching business and journalism, effective July 1, 1991. She was placed at Step 16 on the salary schedule.

In 1990, when Stetson was first placed on the certificated salary schedule, Moffett decided to credit her pre-District management experience with Wenatchee Valley College in Washington, in addition to her classified and certificated management service in the District. Moffett applied the Step 7 limit to Stetson's pre-District employment, and advanced her beyond Step 7 based on her service in the District. All of Stetson's management service in the District was credited.

Meanwhile, on April 25, 1991, about one month before the board action, Stetson wrote to then President Myrna Miller (Miller) ostensibly to request a reassignment to the faculty unit because she wanted to teach. The letter indicates that Stetson had already contacted department chair Elaine McLevie (McLevie) and been told that courses in journalism and business existed for her (Stetson) to teach. Stetson informed Miller in the letter of her "understanding" (based on a conversation with Moffett where she was told that management service would count) that her salary placement would be Step 16, "plus or minus any adjustments that may or may not be negotiated." Stetson's letter further stated that "if my assumption is incorrect, I do not wish a reassignment at this time." Miller wrote "accepted" on Stetson's letter.

II. Notice of the Stetson and Gaiz Step Placements

A. Board Agenda Items

For statute of limitations purposes, evidence concerning notice of the Stetson and Gaiz placements on the faculty salary schedule was presented at hearing. A key part of this evidence was the content and distribution of board agenda items.

Claudia Lewey (Lewey), executive secretary to the board of trustees, regularly distributed meeting notices on Thursday before each Tuesday board meeting to all persons on her distribution list. Since UPM became exclusive representative of the faculty, Lewey has regularly distributed notices and agenda items by placing the documents in the UPM campus mailbox. This

packet of information does not include personnel, legal, and negotiation items.

After board meetings, pursuant to this practice, Lewey distributed the personnel items to whomever asked to receive them. Thus, these items are treated as confidential before the board vote but are public information after the board takes action.

However, prior to mid-1990, UPM was not on Lewey's distribution list to receive personnel items after the meeting. On or about August 28, 1990, UPM representatives asked that UPM be added to the post-meeting distribution list for personnel items. Lewey promptly added UPM to her distribution list. Starting in August 1990, Lewey made it her practice to send all personnel items, both certificated and classified, to UPM within three days after the board meeting.

Pursuant to her regular practice, Lewey distributed the board action item showing Gaiz's reassignment to the faculty and his placement at Step 16 on the salary schedule to UPM within three days of the March 12, 1991, meeting. Likewise, the minutes of the March 12 board meeting reflecting Gaiz's reassignment to the faculty were sent to everyone on Lewey's distribution list, including UPM, prior to the April 1991 board meeting.

Lewey also sent the notice of the regular board meeting of May 21, 1991, containing Stetson's reassignment, to all persons on her distribution list, including UPM, prior to the meeting. Pursuant to her regular practice, Lewey distributed the board

action item showing Stetson's reassignment to the faculty at Step 16 on the salary schedule by placing a copy in the UPM campus mailbox a few days following the May 21, 1991, meeting.

B. The May 23, 1991, and June 21, 1991, Meetings

By March 1991, Freschi had become a member of the UPM Executive Council. She received the board action item showing Gaiz's step placement on the salary schedule at Step 16. As of this time, Freschi did not know whether Gaiz had previously been placed on the certificated salary schedule, but she was aware of Douglass's earlier placement.

There are major disputes about whether Freschi told UPM representatives about placement of these former managers on the certificated salary schedule outside the statute of limitations period, which is prior to June 24, 1991. The following is a summary of the conflicting testimony on this point.

Freschi's testimony: On or about May 22, 1991, Freschi said she received a copy of the board agenda item showing Stetson's step placement in her campus mailbox. Freschi said she was amazed that Stetson had been placed at Step 16, the highest level on the certificated salary schedule. Freschi said she realized when she saw the board item that Stetson must have received credit for service as a classified manager to get to Step 16. She knew that Stetson had done some teaching while she was an administrator, but she also knew that Stetson's full-time job in the District had always been in administration, and, moreover, that she was originally a member of classified management.

However, Freschi did not know at this time the precise experience with which Stetson had been credited.

Freschi said she raised the subject of Stetson's salary placement in relation to her own earlier step placement at a UPM budget committee meeting on May 23, 1991. The committee meeting was attended by Hank Fearnley (Fearnley), Bob Peterson (Peterson), Tom Place (Place), Millard Morgen (Morgen), Mike Schutz (Schutz) and Jeff Kamler (Kamler).[6] Lansing was present for about five minutes at the outset of the meeting.

Freschi was the UPM budget monitor, and the budget committee's purpose was to review District expenditures in an attempt to avoid layoffs. As of that date, Freschi claims committee members were aware that Stetson had decided to resign from her administrative position and join the faculty, exercising her administrative retreat rights. In fact, one cost cutting proposal considered by the committee was not to fill Stetson's administrative position.

It was in this context, Freschi testified, that she brought up Stetson's step placement as an example of continuing District favoritism. As additional background, it is noted that, for reasons unrelated to this case, there is no love lost between Freschi and Stetson. Freschi testified regarding her dislike for

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[6]Freschi at first testified, on September 8, 1991, that Paul Christensen was present at that budget committee meeting as well, but later corrected her testimony, recalling that he was still in Europe on May 23, 1991. Morgen chaired the meeting in Christensen's absence.

Myrna Miller and she referred to Stetson as her "enemy." It is also noted that Miller and Stetson were good friends.

In any event, Freschi testified that she told the meeting she (Freschi) had not received appropriate credit for her experience, and compared Stetson's placement at Step 16 to her own placement at Step 11. According to Freschi, she also told the meeting that Stetson had little teaching experience, and she could not understand the rationale for the discrepancy.

Within the next 10 days, according to Freschi, she called Lansing to make sure that he was aware of Stetson's reassignment and to question Stetson's placement at Step 16. Lansing seemed "mildly interested" in the subject, Freschi testified.

In addition, about a month,prior to June 27, 1991, Freschi said she had at least one conversation with Bezemek concerning her salary placement issue. He told her that faculty salary placement was a negotiable issue, and that Freschi's task was to convince UPM, specifically Christensen and Lansing, that she had a grievable issue over her salary placement. Freschi testified she interpreted Bezemek's remarks to mean that she could not file a grievance without UPM permission.

During the week of June 10 or June 17, after talking with Bezemek, Freschi said she questioned Christensen about Stetson's placement. During this conversation, Freschi mentioned her own placement, and again said she did not understand the discrepancy. Freschi claims she told Christensen that she had been given the impression by Bezemek, during a June 12 telephone conversation,

that this was a negotiable issue and a grievance might be appropriate to resolve these discrepancies. According to Freschi, Christensen replied that the issue was new and it was not covered by the contract. Freschi testified she pressed Christensen regarding a possible grievance on her behalf, and Christensen indicated he would talk to Bezemek.

On June 21, 1991, Freschi attended a two-hour luncheon meeting of the UPM Executive Council at a local restaurant. Present were Christensen, Lansing, Kamler, Alice Rocky (Rocky), Barbara Bonander (Bonander), Don Fosse (Fosse), Fearnley and Nikki Lamott (Lamott). In her presentation as UPM budget monitor, Freschi testified, she told those in attendance that Stetson had joined the faculty at the highest level, Step 16, whereas Freschi herself had entered at Step 11. According to Freschi, Lansing noted that UPM had given Freschi permission to send an exploratory letter to the District questioning her own step placement in relation to Stetson's. (Prior to the June 21 Executive Council meeting, Freschi said she had a discussion with Lansing in which she was told to proceed with the grievance, but that she should first send a letter to Margaret Rumford (Rumford), Administrative Dean of Human Resources.) An exploratory letter of this type typically precedes a grievance. Freschi testified that Lansing told her he had consulted with Bezemek, who agreed that an exploratory letter should be sent as an initial step in the grievance process. At the June 21 Executive Council meeting, Freschi testified, she reported that

Bezemek had spoken to Christensen and Lansing, and seemed to say that a grievance was in order.

Freschi sent a letter to Rumford, dated June 27, 1991, requesting an immediate review of her own salary placement:

> I am writing to request an immediate review of my placement on the faculty salary schedule resulting from my reassignment to the Bargaining Unit in June 1987.
>
> At the time, I was placed on Level 10 and will commence Level 14 for the upcoming academic year. I am concerned that at the time of my reassignment I may not have received full consideration for my prior years of teaching experience at the College of Marin and at the University of California. I also have documentable work experience, relating to the teaching of Italian, which I believe was not counted at the time.
>
> As you can understand, an error in my placement on the salary schedule could have implications for the loss of pay and interest associated with it.
>
> I would be readily available to provide any documentation necessary to help you in this review.

On August 1, 1991, Freschi filed a grievance under the collective bargaining agreement. She alleged that her step placement, effective in 1987, was incorrect because she was not given appropriate credit for her experience. As of the close of this hearing, the grievance had not proceeded to arbitration.

Christensen's testimony: Christensen's testimony differs in material respects from the testimony given by Freschi concerning the conversations they had during the summer of 1991. Christensen said he returned from Europe on June 5 and had no conversation with Freschi until the June 21 Executive Council

meeting. At that meeting, according to Christensen, Freschi did not raise the topic of her step placement, nor did she bring up Stetson's placement. In fact, Christensen said that Freschi contributed very little during the entire meeting. He recalled, however, a brief post-meeting conversation with Freschi in the parking lot where Freschi complained about her own step placement. The gist of this complaint, according to Christensen, was only that Freschi had not received appropriate credit for her experience (in an Italian bank and as a teaching assistant), but it was not until July or August that Freschi eventually told Christensen of her Step 11 placement.

Even if Freschi had mentioned her precise step placement after or during the June 21 meeting, Christensen testified, it would have meant very little for purposes of providing notice in this case. Knowledge of the precise step placement does not reveal the criteria used to arrive at a particular level. One needs to know more about a person's background, e.g., work experience and whether a person had been placed on the certificated scale at some earlier point in their career, before a step placement can be evaluated. In Freschi's case, for example, Christensen testified that he was then under the erroneous impression that Freschi had been an instructor in the District previously, and presumably had already been placed on the certificated salary schedule at that time.

At the end of the parking lot conversation on June 21, 1991, Christensen said he referred Freschi to UPM Grievance Officer

Bernadine Allen. At this point, Christensen had no knowledge that Stetson and Gaiz had been reassigned to the faculty. Christensen testified that there was no discussion of Nancy Stetson.

In addition, Christensen testified that on June 21 he could not have mentioned that he talked to Bezemek about a grievance, because he did not talk to Bezemek after returning from Europe until late July or early August.

Finally, Christensen said he had another conversation in July or August, 1991, after Freschi filed her grievance, which in key respects is more consistent with the conversation Freschi claims occurred on June 21. In Christensen's view, Freschi confused the June 21 conversation with the July/August conversation.

Lansing's testimony: Lansing testified that he had no discussions in May or early June 1991 about service credit for step placement of managers in general or about Stetson's step placement in particular. He said no one who attended the May 23 meeting (Lansing attended for only a short period) subsequently informed him that these topics had been raised at the meeting. Lansing also testified that Freschi did not raise Stetson's step placement or her own placement at the June 21 meeting. Nor, he testified, did Freschi indicate on June 21 that Christensen had previously talked to Bezemek.

Lansing testified that he talked with Freschi about her experience credit and potential grievance only once before she

made the initial inquiry to Rumford on June 27, 1991. Lansing first said he talked to Freschi about the matter sometime after June 21, possibly on June 24 or on June 27. Later, when asked if the discussion was on June 21, 1991, he responded "it may be." But Freschi's concern during this entire time frame, according to Lansing, was limited to her opinion that she had not received appropriate credit for certain prior work-related experience; her concern, at least at that point, did not involve the broader issue of step placement. Nevertheless, Lansing conceded that she "may have" mentioned her step placement.

In any event, on June 27, 1991, Lansing too sent an inquiry to Rumford seeking the District's policy covering the granting of service credit for salary schedule placement. Lansing's inquiry to Rumford was prompted in large part by the District's adoption, on June 25, 1991, of a written retreat rights policy for managers, and also by his general knowledge that certain managers were joining the faculty.

Lansing, UPM president and former grievance officer, convincingly testified that concerns of the type raised by Freschi are not uncommon in the District, and are routinely handled by referring the employee to the personnel office. Moreover, because disputes at this stage typically involve mere placement errors and employees tend to treat salary step placement as a private matter, UPM does not ordinarily get involved at this stage. It was for these reasons, Lansing testified, that he did not get involved with the specifics of

Freschi's individual claim at such an early stage. It was only later, when the District refused to adjust Freschi's step placement based on her prior experience, that Lansing counselled Freschi to file a grievance.

Lansing testified that, as of June 27, he had no personal knowledge of the Stetson and Gaiz placements. It was not until a later UPM Executive Council meeting that Council members examined board agenda items and learned for the first time of the step placement of Stetson and Gaiz. During the discussion at that meeting, Council members discussed the work history of Stetson and Gaiz and speculated that their placement at Step 16 was improper. By this time Freschi had filed her grievance.

During the summer of 1991, Lansing testified, he and other UPM representatives had a general knowledge that certain managers were in the process of joining the bargaining unit, and the step placement of retreating managers was reflected in board agenda items. However, Lansing said that these documents did not provide adequate notice for at least two reasons. First, agenda items are voluminous documents, not designed to call attention to step placement of particular individuals. Second, although the documents include the step placement, knowledge *of* step and column placement does not necessarily enable a person to determine the criteria upon which the placement was based. Presumably, Lansing conceded, one could figure out whether a particular placement was correct if one knew the work history of an individual, but the work history is not included in these

documents. In Freschi's case, for example, Lansing said that during May and June 1991 he was aware only that Freschi was a former administrator who had been placed on the faculty salary scale a few years earlier, but he did not know her employment history in general or whether she had previously been placed on. the salary scale in particular.

Other UPM witnesses: Other witnesses who attended the May 23 and June 21 meetings testified in a manner which casts considerable doubt on Freschi's testimony. Bob Petersen, Freschi's neighbor and personal friend who tutored Freschi's daughter, attended the May 23 meeting. He testified that Freschi said nothing about her step placement, and Stetson was mentioned only in the context of a budget committee discussion about salary savings if her management position was left vacant by the District. Petersen said he was "quite sure" that Freschi never mentioned salary step placement because he would have remembered her raising such a personal matter.

Henry Fearnly, who attended both the May 23 and the June 21 meetings, testified that Freschi did not complain about her step placement at these meetings, nor did she raise the placement of Nancy Stetson as an issue. There is nothing in Fearnley's notes, made at the time of the meetings, which suggests otherwise. Like Petersen, Fearnley said Stetson was mentioned only in the context of savings which might be realized if her former position was left unfilled. Thus, Fearnley and others were aware that Stetson

was reassigned to the faculty, but her step placement was not discussed.

Fearnley testified that he became outraged at a July 9, 1991, Executive Council meeting, upon learning for the first time of the step placement policy applied to former managers. (Fearnley was a department chairperson and not even department chairs had been notified of the policy, he said.) This was the first time Fearnley learned of the step placement of former managers on the certificated salary scale, thus indicating that the matter was not discussed at the earlier meetings, as Freschi claims.

Another witness, Millard Morgen, attended the May 23, 1991, budget committee meeting. His testimony corroborated that given by Fearnley in all material respects. In fact, Morgen testified, he viewed the step placement dispute as a significant matter and he would have recalled any such discussion if it had occurred.

Bezemek's testimony: Bezemek disputed Freschi's testimony that she complained to him in May and early June, 1991, about her step placement. He convincingly testified that on June 25, 1991, Freschi told him for the first time of her concern about step placement.

As background to this conversation it must be recalled that, since 1987, Bezemek had represented Freschi in a separate lawsuit against the District stemming from her demotion to the faculty at a loss of approximately $12,000 per year in salary. As settlement of this lawsuit emerged and the action drew to a

close, Bezemek and Freschi had a conversation, on June 25, 1991, about a District settlement offer which contained a waiver clause covering all claims against the District. During this conversation, according to Bezemek, Freschi stated a concern about her step placement, and asked Bezemek if it could be dealt with as part of the settlement. According to Bezemek, he became "incredulous" at the idea because he had represented Freschi for years and now, on the eve of settlement, she injected a new issue into the proceedings. Moreover, Bezemek felt the step placement issue should be dealt with by UPM. Bezemek testified that, as counsel to UPM, he declined to engage in a discussion with Freschi about step placement, suggesting instead that she contact the union for advice on how to proceed. Eventually, a settlement agreement was finalized which did not include the step placement issue.

Prior to June 25, 1991, Bezemek testified, he had no discussions with any UPM representatives about Freschi's step placement. It was not until August 1991 that he discussed the matter with Christensen for the first time, as Christensen testified.

Further, the documentary evidence shows that Bezemek and Freschi exchanged several telephone calls during May and June, 1991. However, Bezemek described as "absolutely ludicrous" Freschi's assertion that they discussed a grievance or Freschi's step placement during these conversations.

Bezemek conceded that the concept of an error in her placement was raised earlier in the context of settlement discussions concerning the lawsuit, but only to the extent that it had salary implications. In addition, during the course of discovery proceedings in Freschi's litigation with the District, Bezemek received documents which confirmed that Freschi had been placed at Step 11 in 1987. Bezemek said he did not pay much attention to her step placement because it was not material to the issues raised in the lawsuit. Further, he said, in reading voluminous documents during discovery, he did not pay much attention to Freschi's employment history because it too was not a central issue in the case. Thus, during the course of the litigation, Bezemek did not become aware if Freschi had been placed on the certificated salary schedule prior to joining the management ranks.

Finally, Bezemek testified that he is not authorized to accept notice of changes in negotiable items on behalf of UPM. He said he represents approximately thirty unions and it would be impossible to practice labor law if his duties encompassed acceptance of such notices on behalf of his clients. There is no evidence in the record that Bezemek, who has represented UPM for several years, has ever accepted notice on behalf of the union.

Based on her demeanor on the witness stand and the overall content of her testimony, Freschi's testimony to the effect that she told UPM representatives or Bezemek of her step placement concerns prior to June 24, 1991, is not credited. The reasons

for this conclusion are more fully set out in the discussion section of this proposed decision.

III. UPM Request for Salary Placement Criteria and Negotiations

In October 1990, Lowney began work on a series of draft guidelines covering placement and movement on the certificated salary schedule. His intent was to memorialize in one document the practices of the department with a view towards consistency. During the drafting process, Lowney received verbal input from Moffett about past practices.

In drafting the guidelines, Lowney said he started with District policies, sections 309 and 309.5, as well as the old formula for crediting noncredit instruction (45 hours equals one unit). Among other things, he incorporated interpretations of policies that had been made in individual cases, as well as material from the current contract.

As an independent document, the guidelines drafted by Lowney was never used in placing any former administrator on the certificated salary schedule. The District continued to rely on what it believed to be established practices in making step placements while Lowney was developing his document.

Before Lowney completed the process of drafting the guidelines, the District, in June 1991, adopted a policy covering retreat rights for managers. Although the policy itself did not expressly address step placement or credit for work-related experience, it prompted Lansing's June 27, 1991, request for the criteria used by the District in placing former managers on the

certificated salary schedule. Lansing knew that some managers were entering the unit and he wanted to know how they were being placed on the salary schedule.

In response to Lansing's request, the District provided UPM with a document entitled Personnel Office Guidelines ("guidelines"), the latest draft prepared by Lowney. However, it did not do so until October 4, 1991.

As stated earlier, the guidelines contained a compilation of information from several sources. Among other things, the guidelines covered, in general terms, various aspects of salary step placement of former managers. As would later emerge during the course of discussions between the parties, the District interpreted the guidelines as representative of the past practice used to place former managers on the certificated salary schedule. In addition, rules such as those embodied in the Padover memo would eventually surface. In any event, production of the guidelines prompted a request by UPM to negotiate.

In the fall of 1991, the District and UPM were involved in limited reopener negotiations.[7] Christensen was chief negotiator

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[7]The current contract between the parties is for the term 1990-1993. Article XXII includes the following zipper clause.

> This document comprises the entire Agreement between the District and UPM/AFT, 1600, on the matters within the lawful scope of negotiations. Subject to the decision of PERB, UPM and the District shall have no further obligation to meet and negotiate, during the term of this Agreement, except as otherwise provided for herein, on any subject whether or not said subject is covered by this Agreement, even though such subject was not known nor considered at the time of the negotiations leading to the execution of this Agreement.

for UPM, and Paul Loughlin was chief negotiator for the District.

Prompted by receipt of the guidelines during the prior week, UPM, on or about October 10, 1991, demanded to negotiate over the District's criteria for placing managers on the certificated salary schedule. Christensen premised the demand on his belief that the guidelines furnished to UPM by the District contained negotiable subjects including, among other things, initial step placement of managers on the salary schedule. In the process of memorializing its practice in writing, UPM asserted, the District had adopted modifications of existing practices.

Loughlin was not personally familiar with the criteria that the District used for step placement. He understood from Rumford, who was a member of the District's negotiating team, that the guidelines simply memorialized the District's past practice. Loughlin's initial response to Christensen was that the contract contained a zipper clause, and the District declined to engage in salary discussions during the term of the contract. ….

At a subsequent negotiation session on October 29, 1991, UPM raised the subject again. Loughlin told Christensen that the subject was not negotiable because the guidelines reflected the District's past practice.[8] He asked Christensen to identify any

[8]Loughin's comments regarding past practice may not have been on October 29. As indicated above, much of the discussion centered on the negotiability of various parts of the guidelines. At various times during these meetings, however, discussions also encompassed whether the guidelines were in accord with past practice. Christensen at first was unclear that the guidelines represented a change in practice, so the parties spent some time clarifying the meaning of the express language in the guidelines. Eventually, it appears that Christensen concluded that the

areas that did not reflect past practice, and, while not conceding negotiability, he indicated he was willing to discuss the matters. Christensen responded that he would be willing to discuss the guidelines to see if some consensus could be reached regarding their content, while holding his argument on negotiability in abeyance. The parties then spent time reviewing the District guidelines.

The guidelines were discussed again on November 12, 1991, but little progress was made. Many of the guidelines were not in dispute. But Christensen indicated that when the District memorialized the long and complex practice of step placement, certain modifications of the practice occurred and these therefore became negotiable. In the union's view, modification of the Step 7 limit was perhaps the key change. As of this time, according to Christensen, he felt that he had received adequate assurances that the guidelines did not affect what he considered to be a blanket Step 7 limit.

At another meeting on December 6, 1991, UPM presented a written proposal to modify the guidelines in various ways. It included a proposal limiting former administrators who enter the faculty to placement at Step 7. There had been no detailed discussion of a Step 7 limit prior to the District's receipt of the UPM proposal. UPM viewed the Step 7 limit as a fair and

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guidelines represented either a change in practice or implementation of a new policy. It is unclear from the record as to when this occurred. Because the timing of the past practice discussion is not dispositive of any issue herein, no finding is made on this point.

equitable way to protect its right to determine the salary of individuals reassigned to the unit.

During the December 6 meeting, the Stetson and Gaiz step placements were mentioned. Apparently fearing lawsuits, Loughlin said that commitments had been given to managers, who would have legal claims against the District if their step placements were altered at this juncture. Eight or nine previous administrators who had returned to the unit had been granted credit for their administrative service. Loughlin said that it was a longstanding practice in the District to grant administrators year-for-year credit for the time they spent in administration when they returned to the faculty. The District remained adamant in its position that the guidelines were not negotiable.[9]

Christensen and Loughlin met again on December 19, 1991. The parties' respective positions with respect to negotiability remained unchanged and little progress was made. Although discussions continued, the main stumbling block continued to be the placement of managers on the salary schedule, especially the Step 7 limit. It was shortly after the December 19, 1991, meeting that Christensen contacted Bezemek and they decided to file an unfair practice charge.

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[9]The District disputes the assertion that Loughlin, during the meetings, said the District was concerned because of step placement commitments to former managers. In addition to Christensen's testimony, the contemporaneous notes of UPM negotiator Henry Fearnley confirm that Loughlin said step placement of managers was not negotiable, and the District feared lawsuits because of commitments given to former managers.

The parties met again on January 16, 1992. They had agreed on several items by this time, but the subject of step placement, especially the Step 7 limit, remained outstanding. A final meeting, on January 22, 1992, did not result in any change in positions.

Miller and Lansing met in February 1992, and discussed step placement of former managers. According to Lansing, Miller said she could not negotiate about the step placement of former managers or the District would be sued by affected managers. Miller agreed that she made these comments to Lansing, but she testified that the comments were based on potential lawsuits under the Education Code.

IV. Post-Complaint Step Placement of Former Managers

After the complaint was issued in this case, several former managers were reassigned to the faculty. *On* July 17, 1992, the complaint was amended to add the step placements of three former managers.

Elaine McLevie was reassigned, effective July 1, 1992, from Vice President, Academic Affairs, to a faculty position teaching English. She was placed at Step 12 on the salary schedule. While an administrator, McLevie had taught an English class in the spring of 1990, and placed on the salary schedule at that time.

McLevie received credit for five years of administrative service in the District and six years of pre-District experience. Her pre-District experience credit was capped at Step 7, although

it exceeded 22 years. McLevie had 13.5 years of prior college teaching and nine years of college administrative experience before joining the District.

Myrna Miller served as College of Marin president from August 1985 to June 30, 1992. Miller had seven years of pre-District college teaching experience in biology and six years of academic administrative experience. After coming to the District, she taught a credit class in 1986.

Effective July 1, 1992, Miller joined the faculty as a biology instructor, Step 14. Moffett capped her 13 years of pre-District teaching and administrative service at Step 7, and advanced her seven steps for her seven years administrative service in the District.

Kent Lowney was the District's personnel director from July 1981 until July 1, 1992, when he was reassigned to the faculty. In 1987, the District reclassified Lowney's position from classified to certificated, although the duties did not change. Lowney now teaches a work experience class and a business class in personnel finance.

On May 4, 1992, Moffett credited Lowney with six of his 20 years of pre-District administrative service in addition to his 11 years service as personnel director. She placed Lowney at Step 16.

V. Notice to UPM Regarding Managers Returning to the Unit

As part of its statute of limitations defense, the District contends that UPM, through several sources, has been aware of the

step placement of former managers on the certificated salary-schedule. These are: (1) dues deduction lists; (2) staffing plans; and (3) payroll records.

A. Dues Deduction Lists

The District's payroll department receives from the Marin County Superintendent of Schools a monthly report listing, by employee, the dues withheld for payment to UPM. Each month the District sends a copy of the updated list to the UPM treasurer with a check for the total dues payment.

The report for August 31, 1987, shows the addition of Freschi's and Yaryan's names and withholding of UPM dues. Their names appear again on the August 1988 list. The lists for 1990 and 1991 reflect dues deductions for Yaryan, Freschi and Douglass.

B. Staffing Plans

In June of each year the District sends a tentative budget for the next fiscal year to the board of trustees. Thereafter, a modified budget is sent to the board for approval.

These documents reflect the District's staffing plan, showing all permanent employees and the accounts out of which they will be paid. Lewey regularly distributes copies of this information to all persons on her distribution list, including UPM. There are public hearings on the budgets, and the budget documents are available to UPM.

The District's budget for 1986-87, distributed by Lewey to UPM in accordance with her regular practice, contains a staffing

plan listing Freschi and Yaryan as management employees. After returning to the unit they were listed in the 1987-1988 budgets as instructors paid out of certificated full-time faculty accounts. Douglass, listed as a manager in the 1987-1988 tentative and adoption budgets, was listed as a faculty member in the tentative and adoption budgets for 1989-1990.

C. District Payroll Records

From approximately 1985 to mid-1990, Manus Monroe (Monroe), monitored District financial records to assure compliance with the District's obligations under a consent decree in the so-called 50 percent lawsuit. Monroe met several times a year with Scott Miller, the District's Director of Fiscal Services. Monroe reviewed the District's instructional and noninstructional expenses for purposes of monitoring the consent decree. He also monitored District compliance with a side agreement on reporting manager's teaching salaries.

In this context, Monroe reviewed the "Pay 230" payroll report, which lists all District employees by name, accounts from which they are paid, compensation rate and gross pay. The Pay 230 report is compiled on a year-to-date basis for each payroll, and at the end of the fiscal year. Monroe received both the current reports and the complete fiscal year reports for the last three years. In addition to the Pay 230 reports themselves, Scott Miller provided Monroe with a dictionary of the account codes used in the Pay 230 reports and answered Monroe's questions about the report.

In 1990, Freschi was appointed budget monitor, a position she held for the last three semesters of her two-year service with the UPM Executive Council. As budget monitor, Freschi had access to District financial records and reviewed District payroll reports showing names and salaries of administrators and faculty members in the District.

Using information in the Pay 230 report, one can calculate the step placements for managers who have returned to the faculty. For example, the report shows two monthly payments to Freschi, for July and August 1987, at the rate of $3,488.83. This translates into an annual salary of $41,865.96, or Step 11 on the salary schedule. Similarly, Douglass's compensation as an instructor, after her reassignment to the faculty from management in January 1989, could similarly be calculated by comparing her compensation with the salary schedule to show her placement at Step 12.

VI. Paying Managers to Teach

The contract between the parties provides, at Article 8.10.1:

> A management employee will teach no more than one (1) credit class per year, without UPM approval, except that there shall be no limit on the number of "contract" (non ADA generating) courses offered in the community service program which a management employee will be allowed to teach. . . . (A "credit class" is defined, for purposes of this article, as one class or 3 units, whichever is larger, or 10% of a non-teaching assignment.)

The provision allowing management employees to teach one credit class without UPM approval first appeared in the 1984-1987 contract. The purpose of the contract provision was to encourage managers to maintain teaching skills by staying involved with the instructional program.

In February or March 1987, the parties negotiated a side agreement, which now appears in the contract regarding the charging of management teaching salaries for purposes of reporting under the 50 percent lawsuit.[10] UPM President Tara Flandreau and District President Myrna Miller, who negotiated the agreement, had no discussions about whether managers would be paid an amount above their salary as full-time managers to teach a class. At that time managers were not being paid an extra amount to teach a class.

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[10] The side agreement provided:

> Effective July 1, 1986, a management employee who teaches in the credit program may have the teaching portion of his/her salary charged on the instructional side of the 50 percent calculation.
>
> The portion of salary charged shall be 80 percent pro-rata pay per unit after determining the administrator's placement on the "Permanent and Temporary Credit Certificated Salary Schedule" according to the same criteria used for all other credit instructors.

The "80 percent" rate is based on the rate paid part-time instructors.

At a board meeting on December 6, 1988, the District approved Miller's recommendation that managers be paid to teach a class outside of their management position, and that the following paragraph be added to the management salary schedule:

> Managers may teach a class, outside of their regular workweek in their management position, with the approval of the Superintendent/President. Pay for the teaching assignment will be computed at the overload rate for the certificated salary placement to which the manager is entitled. Teaching assignments shall not conflict with any provisions of collective bargaining agreements.

The "overload rate" is 60 percent, lower than the 80 percent rate included in the side agreement.

Miller proposed the amendment as an incentive for managers to acquire classroom experience, and because it seemed fair to compensate managers who taught in addition to their management duties. Miller admitted that, prior to November 11, 1988, managers were not paid extra to teach classes.

The November 9, 1988, and December 6, 1988, meeting notices and agenda items, contained the recommendation that managers be paid to teach a class outside of their regular management workweek. These were distributed to Flandreau in advance of the board meetings. The minutes of the December 6, 1988, meeting reflecting the change were distributed to UPM before the next board meeting in January 1989. The minutes of the December 6, 1988, meeting expressly describe a "Management Salary Schedule Change" which would "allow payment of managers for teaching assignment beyond their management jobs."

Following the District's approval of the salary schedule amendment in December 1988, the management salary schedule itself, with the provision allowing managers to be paid to teach a class, went to the board in public meetings at which revisions to the management salary schedule were considered or minutes of board meetings approved several times prior to 1992. On each of these occasions, the management salary schedule was contained in an agenda item included with the meeting notice.

Flandreau testified that, as UPM president, she received board agendas and board items referenced in the agenda prior to the board meeting, and checked them to see whether there was anything of interest to UPM. However, while she recalled receiving the packets containing revisions of the management salary schedule, she had no recollection of receiving specific information concerning the new policy designed to pay managers extra for teaching. On this point, Flandreau testified that she typically reviewed board agenda items and minutes of board meetings to identify actions in negotiable areas which affected the bargaining unit she represented. Since the board packets in evidence here covered only the management salary schedule, Flandreau testified, she would not have necessarily paid any attention to their contents.

Pursuant to the District's authorization to pay managers to teach at the overload rate, from the fall of 1988 through the spring of 1991 approximately ten courses were taught by managers. According to Lowney, this represented an increase in about "two

or three" courses from the number of courses taught by managers in the past.

By reviewing the Pay 230 report, it is possible to calculate if a manager was compensated for teaching a class in addition to his/her regular management salary by reviewing the so-called "1205 accounts" for a manager during a specific time period, totaling those accounts and comparing the total with the manager's rate on the management salary schedule in effect at that time. Amounts paid under the "1300 account" in addition to the management salary would reflect extra compensation to the manager to teach.

Freschi learned in 1990 from administrators Pamela Mize (Mize) and George Kozitza (Kozitza) that Stetson had been paid to teach classes in the District. At that time Freschi was a member of the UPM Executive Council. While Freschi served on the Executive Council, she testified, there were discussions beginning in the fall of 1990 about managers being paid to teach classes in the District. As a result of these discussions, Freschi said Lansing was to check with Myrna Miller to confirm if managers were being paid to teach. The subject was brought up again in the Executive Council in the spring of 1991 in conjunction with the budget shortfall and discussion of ways to curtail expenditures to avoid layoffs. At that time, according to Freschi, the Executive Council discussed whether this was a viable cost saving mechanism. In contrast to Freschi's testimony, Lansing said this topic was never raised during

Executive Council meetings. He said he talked to Miller about it, but he received no indication that managers were being paid to teach. He learned that managers were being paid to teach during the course of the hearing in this case.

ISSUES

1. Whether the placement of former administrators on the certificated salary schedule is a negotiable subject under EERA?

2. Whether the placement of former administrators on the certificated salary schedule is covered by the collective bargaining agreement?

3. Whether the District has unilaterally implemented a policy of placing former administrators on the certificated salary schedule in violation of its obligation to negotiate in good faith under EERA?

4. Whether the District unlawfully refused to negotiate about criteria for step placement of former managers from October 1991 to February 1991?

5. Whether the District unlawfully bypassed UPM and dealt directly with former managers who entered the faculty unit?

6. Whether the District breached its obligation to negotiate in good faith when it unilaterally adopted a policy paying managers for teaching?

DISCUSSION

Is the placement of former administrators on the certificated salary schedule negotiable under the Act?

UPM argues that placement of former managers on the certificated salary schedule is a negotiable subject under EERA.

The District argues that since managers are excluded from coverage under EERA they may not be represented by an exclusive representative for purposes of meeting and negotiating with a public school employer. The decisions to reassign administrators to the faculty unit in this case were made while these employees were still in a management status. Therefore, the District concludes, the topic of salary schedule placement of former managers is not within the scope of representation under the Act.

The scope of representation in EERA section 3543.2, expressly makes negotiable "wages, hours of employment, and other terms and conditions of employment." Plainly, placement of individuals, including former managers, on the salary schedule when they enter the bargaining unit involves "wages" and is therefore negotiable under the express terms of the Act. (See Remington Arms Co. (1990) 298 NLRB 266 [134 LRRM 1024].)

It is noted that the former managers at issue here have retreat rights under the Education Code, and they were assigned at a time when they were in a management status. These factors arguably implicate the District's managerial prerogatives and Education Code supersession issues. However, neither factor relieves the District of its obligation to negotiate.

When faced with scope of representation questions which arguably involve managerial prerogatives, the Board has applied the following test. A subject is negotiable even though not specifically enumerated if (1) it logically and reasonably relates to hours, wages, or an enumerated term and condition of

employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission. …. (Anaheim Union High School District (1981) PERB Decision No. 177, pp. 4-5.)

There is no question here that placement of former managers on the negotiated salary schedule relates to wages. It is also beyond dispute that this topic is of great concern to both management and employees, conflict has occurred and collective negotiations is the well established mechanism to resolve salary disputes of employees. In fact, the parties since approximately 1980 have had a relatively stable bargaining relationship in which they have negotiated several contracts including salary schedules which cover a variety of classifications. There is no evidence in the record which suggests that the mediatory influence of collective negotiations is not the appropriate method to resolve this conflict.

The question remains whether negotiating about the salary to be paid former managers here would significantly abridge the District's managerial prerogatives essential to achievement of its mission. This question must be answered in the negative.

The District argues that if step placement of managers were a negotiable topic, it would effectively be required to negotiate with UPM over the reassignment of its managers. This requirement, the District contends, is contrary to the governing board's plenary authority to reassign managers and precluded by EERA. This contention overlooks the fact that the reassignments at issue here were not from one management position to another, obviously a nonnegotiable topic. These reassignments involved former managers who, for a variety of reasons, found themselves in the position of leaving management and joining a bargaining unit represented on an exclusive basis by UPM. This type of reassignment and the placement of former managers on the certificated salary schedule is not the kind of core managerial decision, recognized by the Board in the past, which goes to the heart of the District's ability to formulate policy and carry out its overall mission. (See e.g., Stanislaus County Department of Education (1985) PERB Decision No. 556; State of California (Department of Personnel Administration) (1986) PERB Decision No. 574-S.)

Further, this record contains no concrete evidence that negotiating about the placement of former managers would impact the District's ability to carry out its mission. The reassignment of the managers at issue here was more in the nature of a basic personnel decision, and it involved placement on a salary schedule which had already been negotiated with UPM. Placement of individuals from outside the unit on the negotiated

salary schedule, using criteria unilaterally determined by the District, not only involves no fundamental management prerogative, but it also carries the risk of severely undermining and destabilizing the bargaining relationship.

Based on the foregoing, it is concluded that negotiating about salary step placement of former managers does not run afoul of the third prong of the Anaheim test. (See also Remington Arms Co., supra.)

Nor does the fact that managers are entitled to retreat rights under Education Code, section 87457 et seq., render the placement of former managers nonnegotiable. The relevant Education Code sections relied on by the District (see e.g., Education Code section 87458) provide only that managers have certain retreat rights. These sections are completely silent as to the amount of compensation to be paid former managers once they leave management and become teachers in the bargaining unit. In the absence of Education Code language which "clearly evidences an intent to set an inflexible standard or insure immutable provisions," as to the salary placement of retreating managers, negotiations about this subject should not be precluded. (Healdsburg Union High School District and Healdsburg Union School District (1984) PERB Decision No. 375, p. 7; see also San Mateo City School District et al. v. PERB (33 Cal.3d 850 [191 Cal.Rptr. 800].)

Language satisfying this test is not found in the relevant Education Code sections governing retreat rights for managers.

Therefore, the Education Code retreat rights provisions relied on by the District do not render the topic of salary placement nonnegotiable.

Is the placement of former administrators on the certificated salary schedule covered by the Step 7 limit in the collective bargaining agreement?

UPM argues that step placement on the certificated salary schedule is governed by a series of written rules, unwritten practices, and contractual provisions which have been mutually understood by the parties for years. The centerpiece of this argument is the blanket Step 7 limit in the collective bargaining agreement. According to UPM, the combination of rules and practices prevents anyone from being placed above the contractual Step 7 limit. The District, in response, contends that it acted in accordance with past practice, there has been no modification of past practice, and the blanket Step 7 limit does not apply to former managers in any event.

The resolution of this issue turns in large part on whether the contract language which provides that "Step 7 is the highest entering step for permanent teachers new to the District" covers former administrators who are placed on the certificated salary schedule. It is well settled, as a general rule, that PERB has no authority to enforce agreements between the parties. (Section 3145.5(b).) It is equally well established, however, that the Board may interpret contract language to determine if an unfair practice has been committed. (Grant Joint Union High School District (1982) PERB Decision No. 196.) Where contractual

language is clear and unambiguous, it is unnecessary to go beyond the plain meaning of the contract itself to ascertain its meaning. (Marysville Joint Unified School District (1983) PERB Decision No. 314, p. 9.) However, where ambiguities exist in contractual language, it is appropriate to examine extrinsic evidence to ascertain its meaning and thus its coverage. (Ibid; Los Angeles Unified School District (1984) PERB Decision No. 407.)

UPM contends that the relevant language covers all new teachers in the District, and even former administrators who enter the faculty for the first time and become "permanent teachers" are considered "new" and thus covered by the Step 7 limit. The District points to the words "new to the District," and argues that former administrators are not covered by the Step 7 limit because they have already worked in the District. Each of these are plausible interpretations of the relevant contract language. Therefore, it is appropriate to examine extrinsic evidence to determine the coverage of this contract clause.

To consider extrinsic evidence in this case, one must reach back to the period prior to the enactment of EERA. Several pre-collective bargaining District policies provided that "a new member of the faculty shall not be recommended for placement higher than Step 7 on the Certificated Salary Schedule, regardless of the candidate's combination of experiences." This sentence, standing alone, appears to cover all new members of the faculty, whether they previously worked for the District in some

other capacity or not. However, this statement cannot be read in isolation. It is part of a larger set of policies, the totality of which appears to encompass only hiring of people from outside the District directly on to the faculty. This is indicated by components of the policy which expressly call for "selection of personnel" through "selection committees," require that positions be "advertised publicly," suggest interviewing at least five candidates for a position, and seek student involvement in the selection process.

Nowhere do these policies suggest, directly or indirectly, that they were intended to cover former administrators who enter the faculty via the Education Code retreat rights route. Under the Education Code, former administrators are not required to navigate the kind of selection procedures described above and obviously designed to evaluate applicants from outside the District. It was from this background that the Step 7 limit emerged and eventually found its way into the first collective bargaining agreement. Therefore, it is necessary to examine bargaining history to determine if the parties have tailored their contracts to permit application of the Step 7 limit to former managers, as well as to applicants for faculty positions.

During the first round of negotiations, UPM proposed salary schedule placement by committee. This was rejected and a similar version of the Step 7 limit reflected in the District's early policies was placed in the contract. Hence, the initial contract language provided that the Step 7 limit applied to "teachers new

to the system," but there was no discussion about the scope of this language in general, nor was there discussion specifically about former managers. There was agreement, however, that the contract would modify or replace policies inconsistent with its terms. To this end, Christensen met with Hall and Curtis to iron out inconsistencies, but the record is unclear as to precisely what came of these meetings with respect to the Step 7 limit as it related to prior District policies.[11] The record is clear, however, that there was no discussion concerning application of the Step 7 limit to former managers.

The next two rounds of negotiations, 1981-84 and 1983-84 reopeners, included no discussion of the Step 7 limit.

At the end of negotiations for the 1987-90 contract, Lansing and Lowney discussed the Step 7 clause as part of an effort to finalize language. However, their discussion was not one which sheds light on the instant dispute. The term "teachers" was changed to "permanent teachers" because temporary teachers had been added to the contract with a Step 3 limit, and the Step 7 language was changed to reflect that it applied to permanent teachers. Also, with little discussion, Lansing and Lowney agreed to change the term "system." to "District."

Finally, there were no discussions during the negotiations for the 1990-93 contract concerning the application of the Step 7 limit to former administrators who enter the faculty.

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[11]Christensen's best recollection is that the attempt was aborted.

As UPM points out in its brief, there have been negotiations over the years which have resulted in step limits for specifically identified groups of employees for salary placement purposes.[12] However, these limits were adopted as part of narrowly focused negotiations aimed at expressly identified groups. There have been no agreements or even discussions between the parties covering placement of former managers.

Based on the foregoing, it is concluded that the District's pre-collective bargaining policies as they relate to the Step 7 limit did not apply to former administrators who are placed on the certificated salary schedule. Indeed, Pia's Padover memo, discussed immediately below, supports this conclusion. In addition, although the parties have discussed step limits during several rounds of bargaining, and in fact have included limits in their agreements, they have never discussed step limits as applicable to former managers. Therefore, I conclude that the parties have reached no mutually understood meaning for the phrase "Step 7 is the highest entering step for permanent teachers new to the District."

The meaning of this language nevertheless is important in resolving the underlying dispute presented here. Faced with lack of mutually understood meaning of contract language in the past, the Board has construed language in accordance with its facial or plain meaning. (The Regents of the University of California

[12]E.g., part-time credit faculty in 1987 and noncredit ESL faculty in 1990.

(1991) PERB Decision No. 907-H.) Since the parties have not mutually placed a special meaning on the words "permanent teachers new to the district," the language is to be given its "ordinary" meaning. (Butte Community College District (1985) PERB Decision No. 555, p. 12; see also The Regents of the University of California, supra, PERB Decision No. 907-H.)

Under this approach, I read the language as containing two components. To fall within the meaning of this phrase, an individual must be (1) a permanent teacher and (2) new to the District. Also, the contract defines "District" as the "Marin Community College District." The former managers at issue here, by virtue of their placement on the certificated salary schedule, are now permanent teachers. But, they are not new to the District, having worked in the management ranks previously. Therefore, it is concluded that the relevant contractual language does not apply to former managers.[13]

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[13]The District points out that to the extent initial placement of former managers above Step 7 is prohibited by the contract, PERB is without jurisdiction to resolve the dispute. (Los Angeles Unified School District (1990) PERB Decision No. 860.) I have already indicated in a pre-hearing order that, assuming the contractual Step 7 limit is applicable to former managers, the statutory issues presented here (e.g., refusal to negotiate about criteria used to credit experience) are separate allegations which are appropriately before PERB, even though they may be inextricably intertwined with a contract provision. See pre-hearing order of the undersigned ALJ, dated June 12, 1992, pp. 7-8. However, since I have concluded that the collective bargaining agreement does not cover the step placement of former managers, the deferral issue is not presented here and there is no need to consider the District's renewed motion to dismiss based on deferral grounds. See District's Opening Brief, p. 6, fn. 1.

Has the District unilaterally established a practice of placing former administrators on the certificated salary schedule?

UPM argues that the step placement of former managers on the certificated salary schedule violated past practice, and UPM was kept in the dark about the specific criteria used to place managers. Thus, UPM concludes, it was never afforded notice and an opportunity to negotiate about these placements. The District, in response, argues that a practice of placing former managers on the certificated salary schedule has existed openly for years, and its most recent placements have been made in accordance with the established practice. Further, the District asserts, UPM had actual or constructive knowledge of the practice and took no action. Thus, the present unfair practice charge is time-barred.

The Padover case was the first concrete example of a former manager being placed on the certificated salary schedule. Pia determined that Padover's case was one of first impression and proceeded to develop a rationale for his decision to place Padover. Pia credited Padover with up to seven years of pre-District experience, exercised what he believed to be his discretion as personnel director in determining whether Padover's prior work experience was related to his teaching assignment, and then credited Padover's management service. Since faculty members who entered the administration and then later returned to the faculty were credited with their service as administrators, Pia reasoned, it was only fair to credit Padover with his

management service. In accord with this approach, Pia placed Padover at Step 13.

In a 1981 memo to Moffett describing the rationale for the Padover placement, Pia wrote that "there is no precedent in the District either in policy or past practice for placement of a management team member on the salary schedule." Plainly, the Padover case was the first of several steps which ultimately grew into a policy covering step placement of former managers on the certificated salary schedule.

The District, largely through Pia's successors in the personnel department, has applied the rules contained in the so-called Padover memo repeatedly over the years. It is undisputed that Moffett retained the memo in her files since 1981, and both Moffett and Lowney used it in placing former managers on the certificated salary schedule. Because the District placed former managers on the certificated salary schedule at various times over the years, it is unclear at what precise point the Padover memo and other rules applied by the District ripened into an established practice. However, it is clear that, the placement of former managers on the certificated salary schedule reached its height in 1991 and 1992 with the reassignment of the managers at issue here. Thus, it is fair to conclude that with the 1991 and 1992 placement of former managers on the certificated salary schedule, the District had unilaterally established a policy.

Lowney, who succeeded Pia in 1981, never discussed the Padover memo with Pia and testified that he recalled seeing it

for the first time in the mid-1980s. Moffett had been aware of the Padover memo since Pia's departure. Of crucial significance here is the fact that at no time did Moffett or Lowney give a copy of the Padover memo to UPM, nor was UPM otherwise made aware of any District policy related to the step placement of former managers.

Meanwhile, using the Padover memo as precedent, the District has unilaterally assumed the discretionary authority to make a wide range of decisions in awarding service credit to former managers and placing them on the certificated salary schedule. These decisions were made at different times over the past 12 years, including the step placement of eight former managers challenged here. However, every step placement decision regarding these former managers, and the District's rationale for each, need not be discussed here to resolve this dispute. A few rules adopted by the personnel office illustrate the nature of the decisions made by those who staffed that office.

For example, in the past individuals who entered the unit were capped at certain step levels, either by District policy, practice or the terms of a contract. Under rules unilaterally derived from the District's interpretation of pre-collective bargaining policies, a six year cap is placed on pre-District experience, and District experience counts for advancement beyond Step 6. But no overall cap exists for former managers who are placed on the certificated salary schedule.

In another area, Tara Flandreau and Alexandra Hall were not given credit for classified service when they were placed on the certificated salary scale. In this case, Yaryan and Stetson were awarded credit for classified service upon their reassignment from the administration to the faculty.

Further, it was Lansing's understanding as UPM president that credit for placement purposes was not awarded for noncredit instruction.[14] In fact, UPM had to negotiate separate provisions in the 1990-93 contract to award ESL instructors credit for noncredit instruction. And, as evidenced by the placements of Jim Parthum, Dana Pritchard, Tara Flandreau, and others, in reality there was no consistent practice regarding granting credit for noncredit instruction. Yet, the District in this case awarded former managers credit for noncredit instruction.

There is a dispute about awarding credit for management experience unrelated to the teaching assignment, and no written guidelines exist to determine when management service is related to the particular teaching assignment. In the past, faculty members who moved into management and later returned to the faculty were credited with their management service upon returning to the faculty, with apparently no attempt to assess whether their service in the administration was related to their teaching assignments for purposes of crediting the experience on the negotiated salary schedule when they returned to the unit.

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[14]Lansing described a noncredit instructor as one who works at an hourly rate, and may or may not be ADA (average daily attendance) generating. A credit instructor is ADA generating.

Since former managers at issue here were treated in essentially the same way, the District argues that there has been no change. However, it has not been established that UPM was aware of this practice. Lansing testified that UPM was not aware that unit members who went into management and returned to the unit were given credit for management service which may have been unrelated to their teaching positions.[15] According to Lansing, it is not uncommon for unit members who enter management temporarily to forego certain benefits that they would have earned if they had remained in the bargaining unit. The treatment of former managers in this case was different in another sense; unlike the faculty members who went to the administration and returned to the unit, at least some of the former managers at issue here had never previously been placed on the negotiated salary schedule. Against this background, the District adopted a rule which grants credit for management experience and only the personnel director has the authority to determine if management service is related to a particular teaching assignment.

In sum, the District has unilaterally established a system of awarding credit for the step placement of former managers who enter the bargaining unit. This is an area uncovered by the parties collective bargaining agreement, and not addressed by District policy. As discussed elsewhere in this proposed decision, UPM was not given notice and an opportunity to

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[15]Christensen testified that he has heard of this practice over the years, but only through hearsay.

negotiate about the implementation of this practice and the placement of these managers on the negotiated salary schedule. The unilateral implementation of negotiable terms and conditions create a destabilizing effect on the bargaining relationship and have long been viewed as unlawful by the Board. (See e.g., San Mateo County Community College District (1979) PERB Decision No. 94.)

The District raises several defenses to the charge that it breached its obligation to negotiate in good faith. It first argues that Freschi, on several occasions outside the six-month statute of limitations period, told various UPM representatives of the step placement of former managers.[16] For the following reasons, her testimony on this point is not credited.

The record is replete with inconsistencies which tend to cast doubt on Freschi's ability to recall events with accuracy. A few examples illustrate this point. Freschi testified on three days during the hearing. On the last day of her testimony, after reading transcripts of her earlier testimony, Freschi changed her testimony in several areas. First, she initially testified that Christensen was at the May 23, 1991, meeting, but she corrected herself because Christensen was actually in Europe at the time. This discrepancy in her testimony is magnified when one considers that her initial testimony about the May 23 meeting included details about Christensen's participation at the meeting. Thus, the error was not a mere mistake about Christensen's presence;

[16]This unfair practice charge was filed on December 24, 1991.

Freschi actually described his conduct at a time he was not present. Second, on direct examination she testified that she first talked with UPM Grievance Officer Allen in late July or early August 1991. On cross examination she testified that the conversation with Allen was much earlier, in June. On her third day of testimony she said the correct version was the one given during her direct testimony. She added that she had only two conversations in her life with Allen, in July and August 1991. But it was pointed out during cross examination that she had many more. At another point in her testimony, she testified at some length about advice Bezemek gave her during a June 12, 1991, telephone conversation to the effect that her step placement' was negotiable and grievable. Later, however, she said she could not recall precisely who she spoke to on that day, Bezemek or his associate. On another occasion, she said she had a conversation with Christensen during either the week of June 10 or June 17, where she raised the step placement issue. But later she said she could not recall what "transpired" during that conversation. She could only recall seeing Christensen at the time, and had no recollection of what was discussed. Asked again about the conversation with Christensen, she recalled the discussion (concerning step placement of former managers) in detail.

None of these examples, standing alone, either dispose of the issues presented here or even indicate that Freschi intentionally misrepresented facts, as UPM contends. Nevertheless, these examples tend to cast doubt on Freschi's

ability to recall significant events with accuracy. Thus, when her testimony is judged against the weight of the testimony given by several other witnesses who testified in rebuttal to what she had to say, the balance tips against Freschi.

Freschi's testimony that she raised the step placement issue at key UPM meetings on May 23 and June 21 stands in stark contrast to several UPM witnesses who said with great certainty that, in fact, she never brought this topic up. All of these witnesses (Fearnley, Morgen, Lansing, Petersen and Christensen) were entirely believable, and there is no reason in the record to doubt their testimony. To the contrary, Petersen was Freschi's personal friend and neighbor who tutored Freschi's daughter in math. Petersen said he was sure Freschi did not raise the step placement issue on May 23. And Freschi said she has known Fearnley since 1983. She described him as a person who she trusted. Fearnley testified along the same lines as Petersen, and his contemporaneous notes do not indicate that Freschi raised the step placement issue.

For similar reasons, Freschi's testimony that she discussed her step placement and her grievance with Lansing prior to June 21, 1991, is not credited. Lansing was a convincing witness who placed the relevant conversation with Freschi no earlier than June 24, and possibly as late at June 27, the day both Freschi and Lansing sent their inquiries to Rumford.[17] Given Freschi's

[17]While Lansing's later response that his first contact with Freschi may have been on June 21, 1991, tends to cast some doubt on his recollection, considered in the overall context of the

inability to recall facts with clarity, I find Lansing's testimony on this point more credible.

It is also noteworthy that Freschi's June 27 inquiry to Rumford addresses only her personal complaint that she was denied credit for certain work experience. It does not address the larger step placement concern which she claims to have raised with various UPM representatives. A logical inference to be drawn from this omission is that Freschi, as of June 27, 1991, was not yet fully aware of the broader issues.

Further, Bezemek convincingly testified that Freschi told him of her step placement concerns for the first time on June 25, 1991, and he was incredulous that she would inject this issue into the settlement talks at such a late date. While Freschi's recall in many respects was deficient, the same cannot be said about the testimony given by Bezemek.

In any event, Bezemek, as UPM counsel, is not authorized to accept notice or take independent action on behalf of his client. As counsel for approximately 30 unions, Bezemek testified, it would be an impossible task to keep track of contract provisions

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record, it does not detract from the weight of the remaining testimony which shows that Freschi did not place UPM on notice outside the statute of limitations period. In any event, Freschi's concern at this time was limited to her individual placement claim (denial of credit for certain experience) and not to step placement in a broader sense. Lansing testified that UPM typically does not get involved in individual claims of this type at such an early stage. Thus, her comments to Bernadine Allen between June 22 and 27, 1991, to the effect that she was concerned about her placement because other returning managers had been placed at a higher level would not have raised a red flag for UPM.

and past practices to the extent that he could reasonably be expected to recognize the implementation or modification of a new practice or policy.

The District also argues that Bezemek, during the lengthy litigation concerning Freschi's 1987 reassignment, learned that Freschi had been placed at Step 11. However, as pointed out in more detail later in this proposed decision, knowledge of one's step placement, standing alone, does not provide adequate notice of the employer action under attack here. Even if Bezemek had been authorized by UPM to accept notice, he would have needed more information - work history, prior placement, etc. - to be charged with notice under the Act. In sum, learning of a particular step placement in the context of lengthy and complex litigation about issues which were only loosely related to the issues presented here is not valid notice under the Act.

The District next argues that UPM had actual notice of the ' Stetson and Gaiz placements more than six months prior to the filing of this unfair practice charge through the delivery of board agenda items to the union. These items, the District contends, showed the placements of both Stetson and Gaiz at Step 16 of the salary schedule and should readily have alerted UPM to a "potential issue" concerning the service or experience credits that Stetson and Gaiz received. Under the circumstances presented here, I find this defense unpersuasive.

In Victor Valley Union High School District (1986) PERB Decision No. 565, at p. 6, fn. 6, the Board observed that "an

agenda may suffice [for notice purposes] if it is delivered to a proper official and is presented in a manner reasonably calculated to draw attention to any item(s) reflecting a proposed change in a matter within the scope of representation." The agenda items themselves and the circumstances under which they were provided to UPM do not satisfy the notice requirements under the Victor Valley test.

The agenda items at issue here were not "reasonably calculated" to put UPM on notice. The District made no calculation about whether the documents constituted sufficient notice. In fact, at all relevant times the District operated under the assumption that the Stetson and Gaiz placements represented no change in practice, and, further, that even if the placements constituted a change the entire area was not negotiable. Thus, the District cannot now argue persuasively that the agenda items were reasonably calculated to give notice.

In addition, the agenda items were voluminous documents not designed to call one's attention specifically to the step placements. And they included only the actual step placements of Gaiz and Stetson. They did not include the criteria used to determine the placements, work history, or whether Stetson or Gaiz had been placed on the certificated salary schedule in the past. As several UPM witnesses testified, without this information the step placement itself is at best only one piece of the puzzle. And, standing alone, it is a largely meaningless piece of information. A cursory reading of the issues presented

here indicates that the UPM allegations are directed at the underlying criteria used to place an employee at a particular step, as well as at the step placement itself. The agenda items at issue here, while vaguely signaling a "potential" issue, as the District contends, do not rise to the level of the kind of notice contemplated by the Act. (See Regents of the University of California (1990) PERB Decision No. 826-H, p. 8 (limitations period begins to run when the exclusive representative learns of the "rationale" for the employer's decision); Regents of the University of California (1983) PERB Decision No. 359-H (conjecture or rumor insufficient to provide adequate notice).)

Under Victor Valley, "actual knowledge" of a proposed change will suffice, but even actual knowledge must "clearly inform" the recipient of the proposed change, and must be given "sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate." (Victor Valley Union High School District, supra, p. 5.) The agenda items provided by the District did not satisfy this obligation in the present case. (See also San Diego Community College District (1988) PERB Decision No. 662, affirmed San Diego Adult Educators v. PERB (1990) 223 Cal.App.3d 1124 [273 Cal.Rptr. 53].)

The District next argues that UPM had constructive notice of the step placements of former administrators (Freschi, Yaryan and Douglass) through several remaining sources. These are (1) the budget monitors, who had full access to the District's "Pay 230"

payroll reports, (2) general knowledge that administrators were being reassigned to the faculty, (3) monthly dues deductions, lists sent by the District to UPM, and (4) District budgets, which included staffing plans showing that managers were joining the unit. The District contends that UPM could have gathered payroll records, dues deduction reports, budget reports, etc., analyzed them in conjunction with the negotiated salary schedule, and figured out the step placement of former managers.

In arguing that the information provided to UPM via these sources put the union on constructive notice, the District relies primarily on Riverside Unified School District (1985) PERB Decision No. 522, where the Board adopted the following regional attorney view of constructive notice

> Absent actual notice, the limitations period begins to run when the persons affected have constructive notice of the violation. They are aware of the events which manifest the change and should reasonably be aware of the significance of the events. Certainly, a rule should not be endorsed which would toll the limitations period where the charging party knew that certain events occurred but did not realize that these events constituted an unfair practice. (9 PERC Para. 16212, p. 608.)

For the same reasons the agenda items did not constitute actual notice, it is concluded that the remaining sources of information listed above did not amount to constructive notice under Riverside.

As pointed out above, UPM may have been aware that certain managers were entering the faculty unit at designated steps on the negotiated salary schedule.; But the information in the Pay 230 reports, dues deduction lists, staffing plans or general

knowledge falls short of putting the union on notice as to the "significance of the events." Nor do the facts here fall within the Riverside observation that no rule should be endorsed which would toll the statute of limitations when the charging party knew of the events in question but did not realize that they constituted an unfair practice. Here, UPM did not know of the significant events (e.g., work history upon which credit was given, etc.). It knew only of managers entering the unit and arguably of their step placement. Absent knowledge of work history and the specific criteria used to place these former managers, knowledge of their step placement and even their monthly salary is insufficient notice under the Act, especially when it is presented in the form of voluminous documents given to UPM for purposes unrelated to the matters at issue in this case.[18]

Further, under PERB law actual and/or constructive notice will suffice. However, even actual or constructive notice must be provided in a form which is "reasonably calculated" to draw attention to the event in question. (See Victor Valley Union High School District, supra.) Under this test, the notice requirement does not contemplate an exercise which places the

[18]Riverside may also be distinguished on the facts. In that case, a disgruntled individual (Tony Petrich) appearing pro per, alleged the district misconstrued a negotiated salary schedule. Petrich himself was covered by the contract and thus would have been affected personally by the district's alleged misinterpretation. For this reason, among others, the regional attorney concluded the charging party had constructive notice and dismissed the charge. The evidence presented here cannot reasonably be compared with personal notice in Riverside.

burden on the union to gather and analyze information for the purpose of determining whether it has bargaining rights or whether its bargaining rights have been denied. Proper notice requires an affirmative obligation on the part of the employer to tell the union of proposed changes in negotiable subjects.

The District next argues that Freschi knew of both the Gaiz and Stetson step placements, as well as her own step placement, outside the statute of limitations period. She also knew that Stetson had mostly management experience in the District, held classified positions, and had done little teaching. This knowledge, the District contends, must be imputed to UPM because of Freschi's position on the Executive Council.

It is now well established that, as to employers, common law agency principles apply. (Inglewood Teachers Association v. PERB (1991) 227 Cal.App.3d 767 [278 Cal.Rptr. 228].) The same rule has been applied to employee organizations. (Los Angeles Community College District (1982) PERB Decision No. 252, p. 17, fn. 7.) As the court in Inglewood observed, at 227 Cal.App.3d 767, 780, the existence of an agency relationship and the extent of the authority of an agent are questions of fact, and the burden of proving agency and the scope of the agent's authority rests with the party asserting the existence of the agency. Agency status under EERA, therefore, is to be determined on a case-by-case basis.

It is undisputed that Freschi was a member of the UPM Executive Council from 1990 to 1992. By the express terms of the

UPM constitution and bylaws, she was an officer and agent of the union. But even in this capacity her only formal role was to gather information as budget monitor. She had no independent authority to act for or bind UPM in grievances or unfair practice charges. And there is no evidence that she engaged in any activity which may have given the District the impression that she had any authority in these areas. Thus, there was no reason for the District to assume that knowledge gained by Freschi would automatically be imputed to UPM.

The District argues nevertheless that Freschi's knowledge during her service as Executive Council member should be imputed to UPM. As a member of the UPM governing board, Freschi may for some purposes be viewed as an officer and agent of the union. However, in addressing this argument, the fundamental issue to be resolved concerns the extent of Freschi's knowledge; even if Freschi is an agent of UPM she may not have possessed the requisite knowledge to establish notice.

The extent of Freschi' knowledge is not easy to determine, for her testimony is not a model of clarity. She initially testified on direct examination that she knew, based at least in part on personal conversations with Stetson in about 1984, that Stetson had limited teaching experience and served in a classified management position when she first entered the District. But she later conceded on cross examination that she did not know with certainty the specific types of service for which Stetson was credited. Freschi said she "knew generalities,

but not the specifics." Thus, she conceded that her concerns about Stetson's placement were premised at least in part on assumptions about the kinds of experience for which Stetson received credit. It was not until the fall of 1991, Freschi admitted, that she learned of the specifics concerning the credit Stetson received for her placement.

With respect to Gaiz, Freschi testified that she had no concerns about his placement when she learned of it in March 1991. Apparently, she was not as familiar with Gaiz's employment history and thus made no assumptions about the correctness of his placement.

There remains the question of Freschi's understanding of the criteria used for her own step placement in 1987. At the time she was reassigned to the faculty, Freschi was not a member of the UPM Executive Council. However, even after she became a UPM officer, she displayed a surprising lack of understanding about the criteria used for the step placement of former managers. For example, Freschi testified that, during the summer of 1991, she was seeking to determine precisely what the rules were with respect to receiving service credit for step placement purposes. It was not until the fall of 1991 that Freschi learned for the first time of the Step 7 limit in the contract. Her June 27, 1991, letter to Rumford raises only her concern that she may have been denied credit for prior work experience; it does not address the larger step placement issues raised here. Also, Freschi's complaint about Stetson's placement was not generated by a belief

that the District had either violated the contract or unilaterally implemented a policy of placing former managers. It was due to her belief, based on mere assumptions and possibly motivated by her negative feelings about Stetson, that Stetson had received preferential treatment. In sum, it appears that Freschi had no understanding that her own placement may have been accomplished in violation of bargaining rights under EERA; it was only after the instant unfair practice charge was filed that Freschi began to develop this understanding.[19]

Based on this record, it is concluded that Freschi's knowledge concerning her step placement, and the step placements of Stetson and Gaiz, even if imputed to UPM, was insufficient to put UPM on notice that the District had implemented a policy for placing former managers on the certificated salary schedule. It bears repeating that assumptions, like "conjecture or rumor," do not constitute the kind of notice contemplated by the Act. (See Regents of the University of California, supra, PERB Decision No. 359-H.)

In any event, the statute of limitations begins to run when the charging party has actual or constructive notice of the respondent's "clear intent to implement a unilateral change in

[19]Assuming Freschi knew of the criteria used to grant credit to former managers, it cannot be overlooked here that Freschi benefitted from the District's unilaterally implemented placement policy. Thus, to the extent Freschi was aware that she had been awarded service credit for placement on the certificated salary schedule in derogation of UPM's bargaining rights under EERA, it is questionable whether she would report the specifics about her placement to UPM. In this context, it is not reasonable to impute any knowledge she might have had to UPM.

policy, providing that nothing subsequent to that date evinces a wavering of that intent." (The Regents of the University of California, supra. PERB Decision No. 826-H, p. 7.) In this case it has been found that UPM did not have actual or constructive notice in June 1991 of a "clear" District step placement policy for former managers. In fact, it appears that the District itself did not have a coherent understanding of its practices at the time Lansing, on June 27, 1991, requested a copy of the criteria used to place former managers on the certificated salary schedule; it took the District until October 4, 1991, to finally gather and produce the guidelines.[20] As more fully explained below, it was not until the discussions and events subsequent to the October 4, 1991, receipt of the guidelines that UPM fully learned of the changes which are challenged here. This was well within the statute of limitations period.

Did the District unlawfully refuse to negotiate about step placement guidelines in the fall of 1991?

As an independent violation, UPM alleges that the District, from October 1991 to February 1992, unlawfully refused to negotiate about the step placement guidelines. The District, in response, contends that it had no obligation to negotiate with UPM about step placement criteria for former managers. The

[20]In September 1991, Lansing testified, Miller told him the policies were "scattered all over the place" and thus the District needed time to collect them. On another occasion, Miller told Lansing that practices in the personnel office were "unclear." According to Lansing, Miller said "something to the effect that how you were placed depended on the day of the week and who you talked to in the personnel office."

District argues that the topic was not within the scope of representation, the guidelines represented no change, and, even if the guidelines were within the scope of representation, the contract contained a zipper clause which relieved the District of its obligation to negotiate.

On June 27, 1991, Lansing asked Rumford for the District's criteria for placing managers on the certificated salary-schedule, but the District did not give UPM a copy of Lowney's guidelines until October 4, 1991. The content of Lowney's guidelines prompted a request by UPM on October 10 to negotiate. At the time, the parties were engaged in limited reopener negotiations.

In view of the zipper clause contained in Article XXII of the collective bargaining agreement (see fn. 31, p. 57, supra), the District ordinarily would have no obligation to engage in negotiations about salary step placement of former managers. However, it is well established that while a zipper clause may relieve the employer from entertaining union proposals during the life of the contract, it does not cede to the employer the right to make unilateral changes in negotiable matters not covered the contract. (Los Angeles Community College District (1982) PERB Decision No. 252, p. 11; Los Rios Community College District (1988) PERB Decision No. 684, pp. 12-13; Eastside Union School District (1992) PERB Decision No. 937.)

In this case, it has been found that the contract did not cover the step placement of former managers. The District, over

a period of several years, unilaterally adopted a policy for the placement of former managers on the certificated salary schedule, and it was not until October 1991 that UPM was finally given a definitive statement of some of these changes and began to learn the extent of the overall policy. Under these circumstances, the zipper clause provides no defense to the District's refusal to negotiate in the fall of 1991.

The District argues that the guidelines were merely a codification of past practices, and merely reducing these practices to writing did not impose an obligation to negotiate. The rules reflected in the express language of the guidelines and the rules derived from the District's interpretation of the guidelines may have represented the District's view of past practice. But, as discussed elsewhere in this proposed decision, the evidence indicates that UPM was never informed of many practices which the District had employed over the years, and, beginning with the meetings in October 1991, it became apparent that the District's practice of placing former managers on the certificated salary schedule either varied from the past practice as UPM understood it or contained entirely new rules. Thus, UPM correctly concluded that those parts of the guidelines covering step placement of former managers were negotiable. (See Miller Brewing Company v. NLRB (9th Cir. 1969) 408 F.2d 12 [70 LRRM 2907].)

During the course of the negotiations from October 1991 through February 1992, the District agreed to discuss many of the

issues surrounding the placement of former managers on the certificated salary schedule, but it is undisputed that at all times throughout this proceeding the District has adhered to its position that the general topic was not negotiable under EERA. Loughlin feared negotiations would trigger legal action against the District by former managers who had already been placed on the certificated salary schedule, and he claimed that the District had a managerial prerogative to set the terms and conditions of employment for managers. The District has maintained this position throughout these proceedings.

The District nevertheless argues that it negotiated in good faith and it was only after the parties reached impasse that the negotiations ended. While the obligation to negotiate in good faith does not carry the obligation to reach a final agreement, it does require a sincere effort. (See San Mateo Community College District, supra, PERB Decision No. 94, pp. 18-19.) The placement of former managers on the certificated salary schedule is a negotiable topic under EERA, and the District was required to negotiate in good faith about those parts of the guidelines and other aspects of District practice which governed such placements. By its conduct in this case, the District has not engaged in the kind of good faith give and take contemplated by the Act. There can be no genuine impasse where the negotiations have stalled as a result of bad faith negotiations. (See e.g., Oakland Unified School District (1983) PERB Decision No. 326, p. 43, fn. 18; Temple City Unified School District (1990) PERB

Decision No. 841.) Therefore, it is concluded that the District breached its obligation to negotiate in good faith.

Did the District bypass UPM and unlawfully deal directly with retreating managers regarding their salary step placement upon joining the faculty?

As an independent violation, UPM alleges that the District unlawfully bypassed the exclusive representative and dealt. . . directly with former managers. The District, on the other hand, argues that the record evidence does not support the claim of direct dealing and private agreements.

It is well established that negotiating directly with a bargaining unit employee to change existing terms and conditions of employment is a violation of EERA. (Lake Elsinore School District (1987) PERB Decision No. 646, pp. 6-8, adopting decision of administrative law judge at 9 PERC Para. 16175, p. 737.) In order to prove that an employer has unlawfully bypassed the exclusive representative by "negotiating" directly with unit employees, it must be demonstrated that the District sought either to create a new policy of general application or to obtain a waiver or modification of existing policy applicable to such employees. (Ibid; Walnut Valley Unified School District (1981) PERB Decision No. 160.) The evidence surrounding the step placement of the former managers at issue here supports the District's argument that no unlawful bypass of UPM has occurred with respect to these managers.

Douglass wrote a July 27, 1988, memo to Miller requesting reassignment to a teaching position, and Miller approved the

request. But the letter said nothing about step placement, and Douglass placed no conditions on her reassignment. On two occasions Gaiz briefly discussed his placement with Moffett and supplied her with relevant information, but he did not condition his return to the faculty on any particular step placement. Moffett advised Yaryan how to draft and present her June 2, 1987, request seeking credit for certain experience, but Moffett did not advise Yaryan as to the content of the letter. The request was then sent to Lowney, and credit granted in accordance with Yaryan's request. Yaryan had a long series of discussions with Lowney, but it is unclear how many of these, if any, involved salary step placement. Nor does the evidence support the conclusion that Miller, McLevie or Lowney had the kind of discussions with District representatives which determined their step placement and thus constituted unlawful direct dealing. Stetson's contacts with Moffett and her April 28, 1991, letter to Miller similarly did not cross the line into direct dealing. While Stetson's letter to Miller indicates that she viewed adjustments in her step placement as negotiable, in reality her placement was the result of the unlawful unilateral action by the District, not any negotiations which went on between Stetson and Moffett or Miller.

It appears that in none of these cases do the indices of negotiations exist. Like Freschi's step placement in 1987,[21]

[21]Although there are many similarities between the step placement of Freschi in 1987 and the former mangers discussed immediately above, the Charging Party does not argue that

these former managers did not engage in lengthy discussions, explore respective positions, exchange proposals in seeking a particular step placement, or otherwise attempt to reach mutual agreement on criteria used for step placement. Inquiries were definitely made, and individuals were placed on the certificated salary schedule pursuant to District commitments. However, because of the nature of these inquiries, I view these step placements as more akin to by-products of the underlying unilateral change in a negotiable topic than the product of unlawful direct dealing itself. Although the creation of the practice under which the step placements were made breached the obligation to negotiate under EERA, it does not follow automatically that the step placements of the above mentioned individuals constitute independent violations of the Act.[22]

Therefore, it is concluded that the District, by the above-described communications with former managers, did not engage in the kind of direct dealing prohibited by the Act. (See Lake

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Freschi's step placement unlawfully bypassed UPM.

[22]Loughlin's comments during negotiations that commitments were given to former managers do not alter this conclusion. Loughlin (and Miller) were concerned about the possibility of lawsuits against the District if the step placements were disturbed. Since withdrawing a step placement which has already been conferred may indeed give rise to a legal claim against the District, concerns about potential litigation may have been well founded; but that does not necessarily mean that the District has unlawfully bypassed UPM. Only commitments based on unlawful direct dealing violate EERA. As discussed above, the communications between District representatives and former managers did not constitute direct dealing. And since Loughlin had no first hand knowledge of the individual step placements, his testimony about these managers does not carry great weight.

Elsinore School District, supra; Walnut Valley Unified School District, supra.)

Did the District unlawfully adopt a policy which provided for payment to managers for teaching?

UPM argues that the District breached its obligation to negotiate in good faith when it unilaterally implemented a policy paying managers to teach. The District first defends on the ground that this allegation is time-barred. Assuming the charge was timely filed, the District continues, the payment of managers to teach is not negotiable under the Act, and even if it were negotiable there has been no change in terms and conditions of employment which would require negotiations.

The board agenda items and meeting notices for November 9, 1988, and December 6, 1988, and the minutes for the December 6, 1988, meeting were distributed to then UPM President Tara Flandreau. Flandreau also received the board packet on October 10, 1989. Unlike the board documents concerning step placement of former managers, all of these documents contain express language announcing that managers would be paid for teaching. Although Flandreau recalled receiving these documents, she could not recall that they contained specific reference to manager pay for teaching. This testimony, however, does not overcome the actual notice rule found in PERB case law.

An agenda item will suffice for notice purposes if it is presented to a proper official and presented in a manner reasonably calculated to draw attention to the proposed change. (Victor Valley Union High School District, supra, PERB Decision

No. 565.) Unlike the board items dealing with step placement of former mangers, the board items announcing payment of managers who teach were received by the UPM president and expressly described the proposed change. Under these circumstances, it is concluded that UPM had actual notice of the payment of managers for teaching. Therefore, this allegation is time-barred.

Even if this allegation is not time-barred, the Charging Party has not sustained its burden of proof. Negotiability issues aside, in order to establish a violation here, UPM must prove a change which has a generalized effect or continuing impact on terms and conditions of employment of bargaining unit employees. (Grant Joint Union High School District, supra, PERB Decision No. 196.) PERB will not presume such an effect as a result of a unilateral change. The Charging Party has the burden of proof that a change has occurred. (See Imperial Unified School District (1990) PERB Decision No. 825, p. 9.) Based on the record evidence in this case, it is concluded that UPM has not met this burden.

The current contract between the parties provides that managers may teach no more than one credit class per year without UPM approval. This provision has been in effect beginning with the 1984-87 contract. Further, to comply with the so-called "50 percent" law, the parties have negotiated a side agreement which provides that managers may teach in the credit program. Thus, by permitting managers to teach, the District has not deviated from its prior agreements with UPM.

The question remains whether paying managers to teach at the overload rate constitutes a change in a negotiable topic or otherwise erodes the unit. Relying on PERB precedent, UPM argues that managers may not perform bargaining unit work and the role of an exclusive representative is to preserve unit work. (See Rialto Unified School District (1982) PERB Decision No. 209; Mount San Antonio Community College District (1983) PERB Decision No. 334.) UPM further asserts in its brief that the quid pro quo for managers being allowed to teach was that their teaching be limited in amount and unpaid. The arguments are not convincing for the following reasons.

The record does not support the claim that the quid pro quo for allowing managers to teach was that teaching be limited and without compensation. In fact, the record indicates that payment to managers for teaching was never discussed by the parties.

In addition, UPM argues, the union agreed that only a small amount of unit work could be performed by managers. By paying mangers to teach, UPM contends, the District increased the incentive to teach and thereby changed the status quo and displaced more unit personnel.

As UPM points out, an increase in the quantity and kind of unit work removed from the unit may result in an unlawful refusal to negotiate. (See Oakland Unified School District (1983) PERB Decision No. 367.) However, that is not what happened here. The agreement between the parties permits a manager, even without UPM approval, to teach one course per year. From 1988 to 1991, only

approximately ten managers taught courses. While financial incentives may theoretically tend to increase the number of courses taught by managers, thus displacing increasing amounts of unit work, that has not occurred. Lowney testified that there was an increase in only "two or three" courses from the number of courses taught by managers in the past. Since the number of courses taught by managers presumably fluctuates from year to year, it cannot be concluded that an increase in two or three courses constitutes the kind of change in the status quo which calls for negotiations under the Act. The dynamic status quo against which the District's conduct is to be evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) Measured against this standard, the minimal increase of two or three courses which followed the District's decision to pay managers to teach did not mandate negotiations under Board law.

REMEDY

Under EERA, the Board has the authority to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action as will effectuate the purposes of the Act. (Section 3541.5(c).)

In this case it has been found that the District unilaterally implemented a policy of placing former managers on the certificated salary schedule, a negotiable topic under the EERA, and later refused UPM's request to negotiate. This conduct

violated section 3543.5(c) and (b). There being no evidence that individual rights were violated, the 3543.5(a) allegation is dismissed. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.)

It is therefore appropriate to order the District to cease and desist from this unlawful conduct. Specifically, the District will be ordered to cease and desist from the unilateral implementation of its policy of placing former managers on the certificated salary schedule. In the future, if the District seeks to place former managers on the certificated salary schedule, it must give UPM notice and an opportunity to negotiate.

The Charging Party also argues for the recision, upon UPM request, of the step placements of Gaiz, Stetson, Freschi, Lowney, Yaryan, McLevie and Miller. The recision of these step placements would result in substantial loss of income by the named employees. While there are no PERB cases which directly control the remedial question presented by UPM's request, the limited precedent which does exist indicates that the Board has rejected traditional status quo ante remedies which result in loss of income or repayment of money received in derogation of negotiating rights under the Act, reasoning that such a remedy would not "effectuate the purposes of the EERA." (See e.g., Nevada Joint Union High School District (1985) PERB Decision No. 557; Cajon Valley Union School District (1989) PERB Decision No. 766.) The same reasoning is applicable here. Therefore, the

District will not be ordered to rescind the step placement of the former managers at issue here, nor will the former managers be ordered to repay any money received as a result of the District's unlawful action.

The remaining allegations in the complaint, as amended, in Case No. SF-CE-1524 are hereby dismissed.

It is also appropriate that the District be required to post a notice incorporating the terms of the order. The Notice should be subscribed by an authorized agent of the District, indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. (Davis Unified School District, et al. (1980) PERB Decision No. 116; see also Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to the Educational Employment Relations Act (Act) Government Code section 3541.5(c), it is hereby ordered that the Marin Community College District (District) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Taking unilateral action and failing and refusing to negotiate in good faith with the United Professors of Marin, Local 1610, CFT/AFT, AFL-CIO (UPM), exclusive representative of the District's certificated employees, about the step placement of former managers on the negotiated certificated salary schedule.

2. By the same conduct, denying to UPM, rights guaranteed by the Act, including the right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Upon request, meet and negotiate with UPM about any future decision to place former managers on the negotiated certificated salary schedule.

2. Within ten (10) workdays of service of a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB

Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 323 00.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc. sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Fred D'Orazio
Administrative Law Judge